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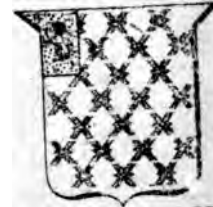
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A
DIGESTED INDEX

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High Court of Chancery.

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MR. VESEY having now, at the close of the nineteenth Volume of his Reports, concluded his valuable labours, the Publishers considered that they should render an acceptable service to the Profession by a general Index to the whole work, digested and arranged in as simple, and yet comprehensive a form as possible. They have been induced to do this, because they considered that a publication extending over so wide a field of legal authority, and embracing so considerable a period of time, might be deemed incomplete without such an appendage.

It has been, therefore, the Editor's principal study to make his work at once useful by following the arrangement pursued in those systems which have been the most approved of; upon this plan, and with these motives, the Editor submits the present Volume to the Profession.

DIGESTED INDEX,

&c.

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ACCUMULATION.

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6. Legacy to A. for life, after which to her children for maintenance, and to be equally divided among them on their arriving at the age of 21. And a legacy to B. on the same conditions, on his attaining the age of twenty-one, held that B. was entitled to the interest for life only. *Longdon v. Simson*, Vol. XII. 298.

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3. — During a particular period, or till a particular event, determines at that period, or on that event: for instance, an administration during the absence of an executor; and the administrator ought in his declaration to aver, that the executor is out of the realm. *Ibid.* Vol. VII. 467.

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3. In cases upon the custom of London and York, the effect of advancement is only to remove that child entirely out of the way, and to increase the shares of the others, and not to increase the part of the estate of which the father would otherwise have power to dispose. *Folks v. Western*, Vol. IX. 460.

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[B.] COMPENSATION TO.

[C.] ACCOUNTS.

[D.] WHEN A TRUSTEE.

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—VENDOR and PURCHASER, [B.] 55.—WITNESS, 2.

[A.] POWERS AND LIABILITY.

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2. A letter written by agent, stating the contents of a preexisting agreement, not admissible; but it

would be, if itself containing the agreement. *Ibid.* 128.

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3. Under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. *De Bouchout v. Goldsmid*, Vol. v. 211.

4. By the civil law, as well as by the law of England, if a person is acting *ex mandato*, those dealing with him must look to his authority. *Ibid.* Vol. v. 213.

5. Payment to an agent is payment to the principal. *Thomson v. Thomson*, Vol. vii. 470.

6. In general, clerks of auctioneers have not authority to sign agreements, so as to bind their employer's principal within the statute of frauds, but allowed under circumstances shewing assent. *Coles v. Trecothick*, Vol. ix. 235.

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1. An agent, who was to have no emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal on his own account. *Massey v. Davies*, Vol. ii. 317.

2. Where no agreement had been made, and no ratio of compensation could be ascertained, the Court disallowed the claim of the agent for extra services. *Beaumont v. Boulton*, Vol. xi. 358.

[C.] ACCOUNTS,

et sup. B. 1.

1. Account between principal and

agent settled from loose papers, the agent having kept no regular books. After his death, liberty was given to surcharge and falsify upon allegation of errors since discovered. *Lord Hardwicke v. Vernon*, Vol. IV. 411.

2. On suspicious circumstances in the answer a general account was decreed against a steward, notwithstanding a receipt in full; which was allowed only as proof of the particular payment, not of a general release or discharge on an account stated; though under circumstances it might have that effect; as upon proof, that the principal never would give any vouchers, and an account kept by the steward. *Midleditch v. Sharland*, Vol. V. 87.

3. Accounts opened, and a general account decreed against an agent, who was also tenant to his principal, in respect of fraud. The character of the defendant, as agent, accompanying him in his situation as tenant, deprives him of the benefit of an objection, that might be competent to another person; as the neglect of the plaintiff in not bringing forward the demand at an earlier period. *Beaumont v. Boulbee*, Vol. V. 485.—Affirmed on re-hearing.

4. Bill for a general account lies against a solicitor and agent, taking a security without a settlement of accounts. *Detillin v. Gale*, Vol. VII. 584.

5. Accounts opened, and a general account decreed, against an agent, who was also tenant to his principal, in respect of fraud. The character of agent accompanying him in his situation, as tenant, deprives him of the benefit of an objection, that might be competent to another person; as the laches of the plaintiff in not bringing forward the demand at an earlier period. The decree affirmed on a re-hearing.

Beaumont v. Boulbee, Vol. VII. 599.

6. Accounts settled between two agents without vouchers upon confidence not to be considered settled against their principal, without liberty to surcharge and falsify. *Ibid.* 617.—See PRIZE.

7. Agent by the desire of his principal keeping large sums in his hands, for which he was to be responsible from time to time, and duly accounting, not liable to interest, even supposing he employed it. *Lord Chedworth v. Edwards*, Vol. VIII. 48.

8. A confidential agent, in that character bound to keep regular accounts, having neglected to do so, and to preserve vouchers against himself, though he had preserved those in his own favour, was on the ground of gross neglect of duty not allowed a charge in respect of bills of costs for business done as a solicitor. *White v. Lady Lincoln*, Vol. VIII. 363.

9. Account against a confidential agent, in possession of estates since 1780, without giving any account to his principal, residing in Ireland; and inquiries into the circumstances of a lease, granted under his direction, and in which he took an interest, and a reversionary lease to himself. *Lady Ormond v. Hutchinson*, Vol. XVI. 94.

[D.] WHEN A TRUSTEE.

1. Agent employed to sell estates took them himself under colour of a fictitious purchase, and sold part; after his death an inquiry was directed to ascertain the real value according to which his estate was to be charged; the principal having an option to take what remained unsold; and the agent having fraudulently prevailed on his principal to execute a lease under the

real value, the agent's estate was charged with the loss arising from that. *Lord Hardwicke v. Vernon*, Vol. iv. 411.

2. Purchase of a share in a colliery in trust for the agent and manager confirmed under particular circumstances, but with reluctance. *Wren v. Kirton*, Vol. viii. 502.

3. An agent to sell cannot convert himself into a purchaser unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed. Issue directed whether there was a sale to him, or whether his possession was as agent and trustee for sale. *Lowther v. Lord Lowther*, Vol. xiii. 95.

4. Bill to set aside leases, obtained by an agent and attorney from his principal, dismissed as to voluntary leases; being pure gift; and no fraud, misrepresentation, &c.; with costs as to some, intended as a provision upon, and inducement to, the marriage of the defendant: without costs as to others: the relation of the parties and the circumstances upon general principles of public policy and utility justifying inquiry.

Another lease decreed to be delivered up: the verdict in an issue establishing, that a full consideration was not paid. *Harris v. Tremanheere*, Vol. xv. 34.

5. Agent, or bailiff, confounding his principal's property with his own, charged with the whole; except what he can prove to be his own; and in this instance, the case of a breach of the terms, upon which the Court dissolved an injunction, the inquiry was directed with costs.

The Court refused in such a case a prospective direction to admit books, not legal evidence; usual in a fair case; as, where from want of notice of an adverse claim a strict account cannot be given; merely

giving liberty to apply upon any question of evidence. *Lupton v. White*, Vol. xv. 432.

6. Corresponding with the rule in equity to charge an accounting party, who has wilfully confounded the fund with his own property, with the whole, throwing upon him the discharge, instances at law, where the defendant having wilfully prevented the plaintiff's proving the real value of his property, damages to the utmost value the article could bear were given: whether that should have been carried far beyond the possible value, *quære*. *Ibid.* 439.

AGREEMENT.

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[B.] IN WRITING.

[C.] REMEDIES TO ENFORCE.

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See CONTRACT, *passim*: LEASE 12, *et seq*: SPECIFIC PERFORMANCE, *passim*: VENDOR AND PURCHASER, [A.] 25, *et seq*: PLEADING, 13.

[A.] PAROL.

1. Parol agreement for a settlement cannot be sued upon afterwards on ground of part performance; but no case of a settlement reciting an agreement before marriage is within the statute. *Dundas v. Dundas*, Vol. i. 199.

2. A parol agreement may be discharged by parol. *Gibbons v. Caunt*, Vol. iv. 848.

3. Rule as to enforcing agreements, *Ibid.* 849.

4. Upon a bill for specific performance of a parol agreement within the statute, the defendant, though admitting the agreement by

his answer, may, if he insists upon the statute, have the benefit of it at the hearing. Per Lord Loughborough, *Cooth v. Jackson*, Vol. vi. 17.

Quære, whether bonds of arbitration are sufficient to take the case of an agreement out of the statute of frauds. *Ibid.*

A specific performance of a parol agreement cannot be decreed though the agreement is admitted by the answer, if the defendant insists upon the statute; if he does not, he must be taken to renounce the benefit of it. Per Lord Eldon. *Ibid.* 37.

In equity, the denial of a parol agreement within the statute is conclusive. *Ibid.* 39.

Upon a parol agreement for a compromise and division of the estate by arbitration, acts done by the arbitrator cannot be considered as acts of part performance to sustain the agreement. *Ibid.* 41.

5. An agreement signed by one party only good to charge him within the statute of frauds. *Seton v. Slade*, Vol. vii. 265.

6. Payment of the auction duty is not a part-performance taking an agreement out of the statute of frauds. *Buckmaster v. Harrop*, Vol. vii. 341. Vol. xiii. 456.

7. The ground of the doctrine of part-performance is fraud. *Buckmaster v. Harrop*, Vol. vii. 341.

8. Whether the answer admitting possession taken under the agreement, takes the case out of the statute of frauds, where it is not clear, what the agreement was, *quære*. The court endeavours to collect what are the terms, *Boardman v. Mostyn*, Vol. vi. 470.

9. An agreement in writing may be dissolved by parol. *Coles v. Trecothick*, Vol. ix. 250.

10. Though the agreement be not signed, yet if a letter contains all

the terms, &c. so that by the contents it can be connected and identified with the agreement, that letter is a writing signed, and satisfies the statute. *Ibid.*

[B.] IN WRITING.

1. Where the only evidence of an agreement for a marriage portion, was a letter written previous to the marriage, leaving it entirely in his own discretion; and a letter written subsequently authorising the husband to draw for the interest as for a bond which was never executed, and without reference to any promise before the marriage, held that the former could not avail to establish a debt against his estate, as not amounting to an absolute agreement, and the latter, no promise being shewn previous to the marriage, was a mere *nudum pactum*. *Quære* whether a previous promise and a subsequent written recognition would be sufficient within the statute of frauds. *Randall v. Morgan*, Vol. xii. 67.

2. Agreement, construction of an inaccurate letter, the basis of a settlement. *Luders v. Anstey*, Vol. v. 213.

3. A bill alleging a written agreement may be sustained by evidence of a parol agreement. *Spurrier v. Fitzgerald*, Vol. vi. 548.

4. Parol evidence admissible in opposition to a specific performance of a written agreement, upon grounds of mistake or surprise as well as of fraud: and bill dismissed. Another bill corrected according to the same evidence, contradicted by the answer, was also dismissed. *Marquis of Townshend v. Stangroom*, Vol. vi. 328.

The rule that a written agreement within the statute cannot be varied by parol, does not affect a subsequent distinct and collateral agreement. *Ibid.* 337.

5. Though a defendant resisting a specific performance may go into parol evidence, that by fraud the written agreement does not express the real terms, a plaintiff cannot for the purpose of obtaining a specific performance with a variation. *Wool-lam v. Hearn*, Vol. VII. 211.

6. By the rule of law, independent of the statute of frauds, parol evidence cannot be received to contradict a written agreement. *Ibid.* Vol. VII. 218.

[C.] REMEDY TO ENFORCE.
And see supra [A.] 3.

1. Discretion in the court to decree specific performance of an agreement for a purchase, or to leave it at law; therefore a purchaser will not be compelled to take a doubtful title. *Cooper v. Denne*, Vol. I. 565.

2. Agreements for sale of an estate, especially if by auction, depend on the *bona fides* of the transaction; therefore trifling errors in the description are not material. *Calcraft v. Roebuck*, Vol. I. 221.

3. The same construction at law and in equity upon the statute of frauds, and part-performance of a parol agreement takes it out of the statute, *Ibid.* Vol. I. 333.

4. *A.* agreed to sell goods to *B.* to be accounted for in part of a debt to *B.*; *C.* with notice agreed to sell the goods as factor; not allowed to retain for a debt to him from *A.* *Weymouth v. Boyer*, Vol. I. 416.

5. Property in a cargo transferred by bill of sale signed by vendor and vendee: but by a new agreement signed by them before they parted, that it shall be sold and accounted for by the factor for vendor, it is reduced to agreement, and therefore remedy in equity. *Weymouth v. Boyer*, Vol. I. 416.

6. Agreement concerning any subject, though in form personal, raises a trust in equity against the party himself, volunteers, and claimants with notice under him; except where the effect would be to restore the power of violating it, as where tenant in tail has suffered a recovery contrary to his covenant. *Ibid.* 478.

7. Contract for the sale of houses, which from defects in the title could not be completed on the day. Treaty proceeded upon proposal to waive the objection on certain terms. The houses being burnt before conveyance, the purchaser is bound, if he accepted the title, and the circumstance, that the vendor suffered the insurance to expire at the day, on which the contract was originally to have been completed, without notice, makes no difference. A reference to the master was therefore directed to inquire, whether the proposal was accepted, or acquiesced in, on behalf of the purchaser. *Paine v. Meller*, Vol. VI. 349.

8. A legatee having taken a mortgage in part payment, subject to an agreement for payment out of the other assets and a resumption of the mortgage, was held entitled to the benefit of that agreement; accounting for the difference of interest. *Sitwell v. Bernard*, Vol. VI. 520.

9. After answer admitting an agreement, and submitting to perform it, the bill being amended as to other circumstances, the defendant was not permitted to take advantage of the statute of frauds by the answer to the amended bill; and a specific performance was decreed. *Spurrier v. Fitzgerald*, Vol. VI. *ibid.*

10. An undertaking to do something, if the will is not changed, is binding. *Byrn v. Godfrey*, Vol. IV. 10.

[D.] WHERE NOT ENFORCED.

1. Apothecary gave his patient fifty guineas to receive five hundred or an annuity of a hundred, if he should survive a year, which he did: bill against executors dismissed, as plaintiff could not succeed at law; but without costs, on account of the money actually advanced, which must have been repaid upon a bill to set aside the agreement. *Priestly v. Wilkinson*, Vol. I. 214.

2. Specific performance of an agreement to build may be decreed, if sufficiently certain: but a general covenant to lay out a certain sum in a building of a certain value cannot be so executed. *Mosely v. Virgin*, Vol. III. 184.

3. Testator by codicil, in 1776, reciting that he had devised his real estate by his last will, dated 25th November, 1752, charged his real estates with his debts and legacies given by the codicil, and appointed executors. The bill was by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil, stating that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator by the death of the other party was bound, if not in law, in honour, and did not mean to revoke the will of 1756 and revive that of 1752; and praying that the will of 1756, and the codicil, might be established; the trusts carried into execution, and the legacy paid: upon an issue directed, the will of 1752 was established; evidence of mistake rejected on farther directions; the plaintiffs relied on the agreement, and offered evidence in support of it; the bill was dismissed, the Chancellor being of opinion that the relief sought was inconsistent with the frame of the bill, and therefore could not be given

under the general prayer; that the evidence ought not to be received; and that, upon the evidence, the agreement was uncertain and unfair, and therefore not to be executed. *Lord Walpole v. Lord Orford*, Vol. III. 402.

4. Under a proviso in a lease to deliver possession, if the premises should be wanted for building, a demand on the ground of having entered into a treaty is not sufficient; otherwise, if an agreement was alleged. *Russell v. Coggins*, Vol. VIII. 34.

5. Decree for specific performance of an agreement to grant a lease, of which only one part was signed by the plaintiff, was found in the possession of the defendant, upon the circumstances; possession, drafts prepared and approved, and the execution deferred only till repairs completed. An extension of the term according to a variation of the agreement, also, in writing, was refused on the ground of want of consideration. *Robson v. Collins*, Vol. VII. 130.

6. Specific performance of a written agreement with a variation by writing; not with a variation by parol. *Ibid.* Vol. VII. 133.

7. Bond by a father to secure an annuity to his son, until he should be in possession of a living of a certain value; and an agreement of the same date, reciting the bond, declaring that the son would forthwith enter into holy orders, and accept such living; the Lord Chancellor expressed a strong opinion, that, upon grounds of public policy, by the effect of the agreement the transaction was illegal; but the decision was upon the ground that the son had not complied with the condition; having received the annuity nine years, and being still only in deacon's orders, and that the an-

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nunity was determinable by the father or his representatives. *Lord Kircudbright v. Lady Kircudbright*, Vol. VIII. 51.

8. Bill for specific performance of an agreement, originating in communications by the commissioners, who took the depositions in a cause, and by the witnesses, to the defendant as to the nature and effect of the evidence. Though the plaintiff was not implicated in the transaction, bill was dismissed on grounds of public policy. *Cooth v. Jackson*, Vol. VI. 12.

9. Though a person may agree to sell at a price to be fixed by arbitration, and the award can be impeached only upon the grounds affecting all awards, as fraud or gross mistake, yet upon such an agreement, where some of the parties to be bound were married women, of whom also one had not executed, the Court refused a specific performance; and dismissed the bill; leaving the plaintiff to law. *Emery v. Wase*, Vol. V. 846.

ALIEN.

And see ASSURANCE, 2: BANKRUPT, [H.] 9.

1. Legacy to a married woman, subject of a foreign state, paid to the husband, to whom it would, by the law of that country, belong. *Campbell v. French*, Vol. III. 323.

2. Residence of a British subject in an enemy's country, for the purpose of a trade licensed by the government of this country, not a disability to sue, or take out, a commission of bankruptcy. *Ex parte Baglehole*, Vol. XVIII. 525.

3. Commerce by a person resident in an enemy's country, as represent-

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ative of the Crown of this country, illegal, and the subject of prize, however beneficial to this country, unless authorized by license. *Ibid.* 528.

AMENDMENT.

See PLEADING, 57: PRACTICE, [D.]: [E.] 6, *et seq.*

ANNUITY.

And see BANKRUPT, [K.] 63: MISTAKE, 3: VENDOR and PURCHASER, [A.] 29, 30.

1. Devisee for life of a rent-charge out of an estate devised in strict settlement assigned it to creditors as a collateral security. Tenant for life, with intent to redeem it for the annuitant, gave bonds to the creditors on condition of giving up their securities to annuitant to be cancelled. Executors of obligor paid all the bonds but one, which they disputed, because though delivered by obligor to a third person for creditor, when he should agree, it was not accepted till after death of obligor. This bond was recovered upon at law. Annuitant entitled as against the executors to the annuity disencumbered, but not to arrears incurred in life of obligor; and as against tenant of the estate to arrears since the death of obligor, but future payments left to agreement, as heir at law of devisor of the annuity not being party, execution of the trusts of the will could not be decreed. *Graham v. Graham*, Vol. I. 272.

2. Interest of arrears of annuity in bar of dower refused. *Tew v. E. of Winterton*, Vol. I. 451.

For such interest some contract for interest upon forbearance is necessary; compassion, poverty, or that she borrowed money, are not sufficient. *Ibid.*

3. Deed reciting an agreement for sale of a life interest in stock; a memorial being registered under annuity act, and there being a covenant to pay any deficiency beyond the produce to the extent of the annual sum specified, and an apportionment in case of death, held an annuity and not a sale. Deeds to secure annuities are within the act, as well as deeds granting them. Where the assignment was of stock in trust to pay two annuities of fifty pounds each, to different persons, for separate considerations of four hundred pounds each, the memorial was of one annuity of one hundred pounds to the trustee in trust, to pay each fifty pounds in consideration of five hundred pounds, and omitted a contingent interest, held insufficient, as not containing a true description of the annuities, nor stating all the interests. *Hood v. Burlton*, Vol. 11. 29.

4. Annuities void, the real amount, consideration, and mode of payment not being truly stated in the memorial, and bond and warrant of attorney being only mentioned generally, without dates or names of parties. All the instruments form but one assurance, and, if the memorial be defective as to one, that vitiates the whole. *D. of Bolton v. Williams*, Vol. 11. 138.

5. An assignment is within the act, and, if void, the assignee cannot stand in the place of the original grantee, whom he has paid; nor will the Court direct an assignment, if the twenty days for enrolling the memorial have elapsed. *Ibid.*

6. On bill of interpleader by the owner of an estate against the grantor

of a rent-charge upon it, assigned to secure an annuity, and the annuitant; the annuity being void, the arrears of the rent-charge, in Court, were paid to the original grantee, and the annuitant held not entitled to have the consideration repaid out of that fund, there being only a general debt at law, and no heir. *Ibid.*

7. Courts of law, which will enter into the validity of the warrant of attorney, or judgment on motion under the Annuity Act, will only set them aside, but cannot order the bond to be delivered up. *Ibid.* 154.

8. The word "such," in the first § of the act, means every deed, &c. by which an annuity is granted, and does not refer merely to the instrument defectively stated in the memorial. *Ibid.* 154.

9. Expense of conveyance falls on the purchaser, if no particular stipulation. *Ibid.*

10. Account of arrears of an annuity decreed against a purchaser with notice; the length of time not being sufficient to raise a presumption of satisfaction. *Wynn v. Williams*, Vol. v. 130.

11. The act with respect to annuities subsisting at that time only restrains the action till its provisions are complied with; not limiting the time; and does not, as in the case of subsequent annuities, make the security void. In the former case, therefore, the bond being by accident lost, the annuitant was admitted a creditor for the arrears of the annuity, the real debt in equity. *Toulmin v. Price*, Vol. v. 235.

12. No execution for the penalty of a bond securing an annuity; but only *toties quoties* for the accruing payments. *Ibid.* 239.

13. Arrears of an annuity secured by bond not allowed beyond the penalty. *Mackworth v. Thomas*, Vol. v. 329.

14. An annuity secured by a bond and a term for years being void, the memorial not taking notice of the term, and the clause of redemption, and stating the payment of the consideration in money, though it was paid by draft, a general account was decreed of the consideration with interest and costs, and of all money received under the annuity; the balance to be paid to the defendant (if any), the securities delivered up, and a conveyance. *Byne v. Vivian*, Vol. v. 604.

15. Where an annuity is set aside, and an action brought for the money, an account is always taken of all money received under the annuity. *Ibid.* 608.

16. Bill to set aside an annuity, secured by a term for years and a bond, upon objections to the memorial for not containing a clause of redemption, for not stating the consideration truly, and other defects. The defendant admitting he had received more than was due to him for principal and interest, the securities were decreed to be delivered up to be cancelled. *Byne v. Potter*, Vol. v. 609.

17. Annuity void, the memorial not containing the clause of redemption, not stating the consideration truly, and being otherwise defective, was set aside by the decree; but the plaintiff having failed in two applications to the Court of King's Bench upon some of the objections, and having in the interval been a party to the assignment to the defendant, the account was confined to the filing of the bill. The defendant was held entitled to the original consideration, though exceeding the sum paid on the assignment. *Bromley v. Holland*, Vol. v. 610.

18. The refusal of a summary application to set aside an annuity is no objection to the same ground

being taken again upon an attempt to enforce it. *Bromley v. Holland*, Vol. v. 617. And see *infra*, 30.

19. An annuity being void, the memorial not containing a clause of repurchase, grantee was not allowed in the account premiums of insurance of the grantor's life and costs incurred in supporting the annuity. *Ex parte Shaw*, Vol. v. 620.

20. Annuity secured by bond and a trust of rents and dividends being void, memorial omitting a clause of redemption, the trust, and stating the consideration untruly; general account decreed of purchase-money from the actual payment which was subsequent to the date of the deeds, and of the premiums paid by grantee for insuring the grantor's life, and an account of all sums received under the annuity with interest respectively; on payment of balance and costs by the plaintiff securities to be delivered up, &c. the bill offering to pay principal and interest, and other fair demands. A letter from the grantor, written prior to the grant, during the negotiation between the parties, was admitted in evidence, but only to show that he had then proposed the insurance of his life as a reasonable term. *Hoffman v. Cooke*, Vol. v. 623.

21. Courts of law have no authority to order instruments void under the Annuity Act to be delivered up, farther than the act expressly gives it. *Bromley v. Holland*, Vol. VII. 18.

22. Annuity void under the act; at law the balance of the consideration may be recovered, deducting the payments under the annuity. *Ibid.* Vol. VII. 23.

23. Annuity void under the act: upon an account of the consideration and the payments under the annuity, if the balance is against the grantee, it has been decided in

equity, that it cannot be recovered. *Ibid* Vol. VII. 24.

24. Distinction between an annuity and a legacy; the former commences from the death; and the first payment is due at the end of the year: a legacy, generally, does not begin to carry interest till the end of the year. *Gibson v. Bott*, Vol. VII. 96.

25. An annuitant falls under the general character of legatee, unless distinguished by the testator; entitled therefore under a residuary bequest in favour of legatees. *Sibley v. Perry*, Vol. VII. 522.

26. An annuity cannot be set aside upon mere inadequacy of price; which can be applied only as evidence of fraud. The notion of a market-price, ascertained in the usual way upon the principle of calculation at an insurance office, is not a just criterion of the value. Therefore a bill to set aside an annuity, the circumstances not amounting to fraud, was dismissed with costs. *Low v. Barchard*, Vol. VIII. 133.

27. Jurisdiction in equity to set aside an annuity upon legal objections. *Ibid*. Vol. VIII. 135.

28. Where an annuity is set aside, the purchase-money may be recovered at law. *Ibid*. Vol. VIII. 136.

29. Stock vested in trustees to the uses of the settlement. An annuity granted by the husband out of the dividends, to which he was entitled for life, the trustees giving a power of attorney to receive the dividends, and covenanting not to revoke it, and to execute any other, &c. requires a memorial; not being an actual transfer within the eighth section of the annuity act. The annuity set aside upon objections to the memorial; particularly in not stating the covenant by the trus-

tees. As to the objection to payment by a draft on a banker, *quære*; Distinction, whether the draft is drawn by the party or a third person. No costs: the grantor not taking the objection, till the consideration was repaid, and the chance turned against him. *Duff v. Atkinson*, Vol. VIII. 577.

30. Upon the plaintiff's appeal from the decree at the *Rolls*, the decree was reversed; and an account was directed of the consideration paid by the original grantee of the annuity, with interest at 5 per cent.; and of the payments of the annuity to the grantee or any persons claiming under him by assignment or otherwise: to be applied in discharge of the interest and principal of the consideration; and if the consideration with interest shall appear fully repaid, or, if not, upon payment by the plaintiff of what shall be remaining due from him, the securities to be delivered up, &c. without costs: the Lord Chancellor's opinion being in favour of the jurisdiction; that the principle of the relief is not redemption, but the invalidity of the grant; and that the assignee, unless under special circumstances, is in the situation of the grantee. *Bromley v. Holland*, Vol. VII. 3; and Vol. V. 610. *supr*. 18.

31. Bill to set aside an annuity dismissed, objections not prevailing, 1st, that the consideration was not paid at the execution of the deeds, though so stated, it appearing that they were sent into Wales to be executed by the surety before the money paid to the principal, who lived in London. 2d, That part of the consideration was returned, it being only paid to the attorney for the expense of preparing the deeds, and not suggested that any part got back to the purchaser. 3dly, That the deed untruly stated by whom the

consideration was paid, it appearing to have been paid by an agent. Payment by an agent is payment by the principal. *Philips v. Crawford*, Vol. ix. 214.

Upon appeal to the Chancellor, the bill also dismissed. Vol. xiii. 475.

32. Annuity granted by a *feme coverte*, charged upon her separate estate, being void under the annuity act, for want of the insertion in the memorial of the clause of redemption, held that the consideration could not be recovered out of her separate estate, although it appeared that part of it was applied in payment of fines upon the admission of her trustee to copyholds. *Jones v. Harris*, Vol. ix. 486.

Quere as to where a *feme coverte*, with separate property, with power to charge, does not execute the charge, *eo modo*, as prescribed by the instrument, if the proposition that she shall be taken to intend to charge such property, in respect of which only the court of equity could give execution? *Ibid.* 497.

Semble the effect of the decisions, that the consideration of a void annuity may be recovered back with interest, is, instead of the protection intended by the act, to increase the evil. *Ibid.* 496.

33. Court ordered an annuity, charged on real in aid of the personal estate to be paid out of a fund in Court, and the annuitant having died between Lady and Midsummer Day, to be paid up to the quarter ending Lady Day. *Webb v. Lord Shaftesbury*, Vol. xi. 361.

34. *Semble*, on the sale of an annuity by the grantee, he must make out the title of the grantor. *Radcliffe v. Warrington*, Vol. xii. 326.

35. Effect of lapse of time in cases of annuity, where it may be an an-

swer to the application. *Morse v. Royal*, *Ibid.* 378.

36. An agreement for an annuity is not within the annuity act, and execution of such an agreement decreed against executors. *Nield v. Smith*, Vol. xiv. 491.

37. What is the debt, and how to be ascertained, upon an annuity bond, forfeited at the time of the grantor's discharge by an act of insolvency, *Quere. Ibid.* 574.

38. Jurisdiction of a court of equity upon objections to the memorial of an annuity. *Dupuis v. Edwards*, Vol. xviii. 358.

Annuity secured on dividends of stock, standing in trust, among other things, for the grantor for life, not within the exception in the annuity act. *Ibid.* 358.

Omission in the memorial of an annuity under the stat. 17 Geo. 3. c. 26. (repealed by 53 Geo. 3. c. 141.) of a proviso for stay of execution under a judgment, one of the securities, until twenty days after default, was fatal. *Ibid.* 358.

Not necessary under the statute 17 Geo. 3. c. 26. to insert in the memorial of an annuity a covenant for payment, or any particular remedy, except as creating a trust within the act; and as to the necessity of stating the trusts, *Quere. Ibid.* 358.

39. Decree on setting aside an annuity, for want of a memorial registered, an account of the consideration, with interest and costs, and of all the annual payments: the balance on either side to be paid; the securities delivered up; and reconveyance. *Holbrook v. Sharpey*, Vol. xix. 131.

40. Annuity, part of the price of an estate, for the life of the grantee, aged thirty-two, taken at an under-value, from his state of health, then not insurable, but afterwards re-

stored, and secured on bond and judgment. The value to be proved on the bankruptcy of the grantor two years afterwards, is, under the peculiar circumstances, not the market-price; nor the price paid originally, with the variation occasioned by the lapse of time (since established as the general rule, *Ex parte Whitehead*, 1 Mer. 10. 127;) but the actual value at the bankruptcy, with reference to the grantee's age and improved health, the price paid, and the enjoyment, as evidence of the value, not simply reducing it by the payments made: the contract involving a contingent risk with reference to the grantee's health, which might have turned entirely against him. *Ex parte Thistlewood*, *Ibid.* 236.

41. Originally under proof in bankruptcy upon the penalty of a bond, securing an annuity forfeited, the annuity itself was received, if assets sufficient. The modern course to prove the value of the annuity as a debt, for convenience of distribution. *Ibid.* 246.

42. Distinction, before the stat. 49 Geo. 3. c. 121. § 17. authorising proof in bankruptcy of annuities generally between covenant, under which arrears only could have been proved, and a bond, under which, if forfeited before the bankruptcy, the value also might have been proved. *Ibid.* 249.

43. Valuation of annuities, in the distribution of assets, subject to abatement as legacies. *Ibid.* 250.

44. Fifteen years' purchase the market-price of an annuity for the grantee's life; much less for the grantor's. *Ibid.* 251.

45. Fifteen years' purchase the ordinary price of an annuity for the grantee's life aged thirty-two. *Ibid.* 253.

46. Ground of the ordinary practice in valuing an annuity for the purpose of the distribution of assets or paying the legacy duty. *Ex parte Thistlewood*, Vol. xix. 254.

47. Stipulated price for redemption of an annuity not the criterion of the value to be proved in bankruptcy. *Ibid.* 255.

48. Grant of annuity voidable by relation for want of enrolment. *Ibid.* 258.

And see ASSETS, 18.—BANKRUPT [K].—BARON AND FEME [C], 11.—FRAUD, 34.

ANSWER.

And see EVIDENCE [F].—INFANT, 22.—PLEADING, 27.—PRACTICE [C]: [I].

1. The answer of an administrator to a creditor's bill, stating, that he believes the debt is due, whether that is sufficient foundation for a decree, *Quere. Hill v. Binney*, Vol. vi. 738.

2. General denial not enough: there must be an answer to the sifting inquiries upon the general question. *Ibid.* 792.

3. An insufficient answer is no answer. *Gregor v. Lord Arundel*, Vol. viii. 88.

4. In a suit for an account an answer going no farther than to enable the plaintiff to go into the Master's office is not sufficient. He is entitled to the fullest information the defendants can give by the answer, not by long schedules, in an oppressive manner, but giving the best account they can; stating, that it is so; referring to books, &c. so as to make them part of the answer; and giving the fullest opportunity of inspection. *White v. Williams*, Vol. viii. 193.

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5. Where an answer is required as evidence upon a trial, the Court, except in a criminal case, does not permit the record itself to go, but an office copy; unless proof of the signature is necessary. Not granted, where the action is by a stranger unconnected with the suit in equity. *Jervis v. White*, Vol. viii. 313.

6. Further explanatory answer by leave of the Court. *Robinson v. Scotney*, Vol. xix. 584.

7. Supplemental answer, substituted lately for liberty to amend an answer, permitted with great caution, only on some strong ground of justice, as fraud; not on negligence, unless the party was led into it; requiring a precise statement of what is to be put on the record. *Curling v. Marquis Townshend*, Vol. xix. 628.

8. Answer without oath or attestation of honour regarded for the purposes of civil justice, as if with that sanction. *Ibid.*

9. Ground of the modern practice, permitting a supplemental answer instead of the old practice to amend. *Ibid.* 631.

APPEAL.

1. Where an appeal is abated in the House of Lords, the order to revive is obtained of course; and there is no fresh summons. *Byne v. Potter*, Vol. v. 305.

2. Appeal to the Chancellor of the Duchy of Lancaster from a decree of the Vice-Chancellor, dismissing the bill, affirmed by him on a rehearing on the petition of the plaintiff. *Omerod v. Hardman*, Vol. v. 722.

3. Order of the House of Lords, that proceedings under a decree of a court of equity shall not be staid by an appeal, unless by special order

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upon application to the House or to the Court. *Huguenin v. Bazeley*, Vol. xv. 180.

4. An appeal to the House of Lords does not stay proceedings in the Court of Chancery, Warden, &c. *St. Paul's v. Morris*, Vol. ix. 316.

5. Motion to withdraw a petition of appeal from the Rolls with consent, allowed. *Thomson v. Thomson*, Vol. x. 30.

6. An appeal does not stay proceedings; but upon a special ground, where the decree was for a specific performance, the Master was directed to settle the conveyance, suspending only the execution. *Gwynn v. Lethbridge*, Vol. xiv. 388.

7. An appeal from the Rolls is, in truth, only a rehearing, and therefore new evidence may be introduced. *Buckmaster v. Harrop*, Vol. xiii. 458.

8. Execution of a decree not staid by an appeal, without a special order. *Willan v. Willan*, Vol. xvi. 89.

The costs, upon application, follow the judgment, if unfavourable. *Ibid.* 216.

9. Plaintiff appealing from a decree dismissing the bill, entitled to the usual order for the production and inspection of deeds. *Church v. Barclay*, Vol. xvi. 435.

10. Decree generally, not staid by an appeal; upon special application, if unsuccessful, with costs. *Waldo v. Caley*, xvi. 209.

11. The Court refused to suspend the execution of a decree obtained by a mortgagee, until six months after hearing an appeal; but gave six months, on bringing the money into Court, consenting to a receiver, and paying interests and costs, on plaintiff's undertaking to repay, if the decree should be reversed. *Monkhouse v. Corporation of Bedford*, Vol. xvii. 380.

Abuse of the right of appeal pre-

vented, not only by costs, but also by requiring the signature of counsel. *Ibid.* 381.

12. Decree not suspended by an appeal without a special ground, the subject of discretion. A legacy therefore paid out of Court upon security notwithstanding an appeal. *Way v. Foy*, Vol. xviii. 452.

Object and effect of the late order of the House of Lords, requiring the parties to appeal, to print their cases forthwith, applying generally to all appeals, to check the abuse of appealing merely for delay and vexation. *Ibid.* 453.

Signature of counsel on appeal to the House of Lords equivalent to the certificate on appeal to the Lord Chancellor. *Ibid.* 453.

13. An appeal does not form a ground to stay process for costs, previously commenced, viz. by *sub-pœna*. Distinction, where the appeal is before any step taken. *Roberts v. Totty*, Vol. xix. 446.

14. Limit of appeal to the House of Lords. *Ex parte Roffey*, Vol. xix. 468.

15. Petition of appeal ordered to be taken off the file with costs, as upon a different case, and introducing a variety of representation, not made in the Court below. *Wood v. Griffith*, Vol. xix. 550.

16. The general order 1725, limiting the time for appeal to one month, cannot prevail against the practice contrary to it. *Ibid.*

17. Appeal not barred by consent to an order under the decree; but that order ought to be inserted in the petition of appeal. *Ibid.*

18. Petition of appeal may state the grounds in the answer against the decree. *Ibid.* 551.

19. The right of appeal not to be lightly refused. *Ibid.*

20. Few cases of staying proceedings under a decree pending an ap-

peal, unless upon irreparable mischief. *Ibid.*

APPOINTMENT.

See POWER, *passim*.

APPORTIONMENT.

1. The ground of relief in apportioning, upon confusion of boundaries, is that there was a duty imposed on the defendant, or those under whom he claims, to keep them distinct. *Grierson v. Eyre*, Vol. ix. 345.

2. Executor of a rector entitled to an apportionment of rent on a lease of tithes. *Hawkins v. Kelly*, Vol. viii. 308.

3. Where the will contained a mixed deposition of property and annuity, partaking most of the latter, held that there could be no apportionment in favour of the executor of the tenant for life. *Franks v. Noble*, Vol. xii. 484.

See TENANCY FOR LIFE, 8.

APPROPRIATION.

1. Where a party who had been in the habit of drawing bills on another, remitted to him a sum for the specific purpose of meeting those bills, but which did not arrive until the day after his death, when it was received by his administrator, held that such fund formed no part of the general assets of the intestate, for the intestate himself could only have applied it to the purpose for which it was remitted. *Hassall v. Smithers*, Vol. xii. 119.

2. Certificates of the East India Company, on payment into their treasury in India, and a navy bill,

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remitted, indorsed by the testator to his agent in England, being at the time a creditor, if they did not pass at law by the indorsement, were, after the death of both parties, the agent having become bankrupt, held not to pass in equity: the inference from the absence of evidence of a specific appropriation being against the assignees; who had obtained possession of all the letters, &c. *Williamson v. Thomson*, Vol. XVI. 443.

ARBITRATOR.

See AWARD, *passim*.

ARREST.

1. A party attending an arbitrator under an order from the court is privileged from arrest. *Moore v. Booth*, Vol. III. 350.

2. The privilege of a bankrupt during his examination extends to an attachment for not paying money under an award made a rule of court. *Ex parte Parker*, Vol. III. 554.

3. Court ordered a party to be discharged from an arrest, and from detainers lodged against him, when arrested on his return from his examination before the master; when the examination is not finished, the question always is whether the party was *bona fide* engaged in the business he was called upon to execute. *Sidgier v. Birch*, Vol. IX. 69.

4. Plaintiff in his return from attending a motion against him in the cause was arrested, and a detainer lodged against him in another action; he was discharged from both: the court examining the parties personally, not by affidavit. *Bromley v. Holland*, Vol. V. 2.

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5. A person attending under a summons of commissioners of bankrupt privileged from arrest. Ordered, that the parties arresting, and who had lodged detainers, having notice, should discharge him. The attorney having undertaken to indemnify the officers, and they having acted under that, guilty of a contempt; and ordered to pay all costs out of pocket. The Lord Chancellor also intimated, that a creditor attending to prove his debt, though not under a summons, is entitled to privilege. *Ex parte King*, Vol. VII. 312.

6. Party attending his own suit privileged from arrest. Vol. VII. 314.

7. Bankrupt's privilege from arrest in attending the commissioners, independent of the stat. 5 Geo. II. Vol. VII. *Ibid*.

8. A bankrupt's privilege from arrest extends to the end of the 42d day. Ordered that the plaintiff in the action should discharge him; and the officer having acted without instructions was ordered to pay the costs. *Ex parte Donlevy*, Vol. VII. 317.

9. Whether a deviation by a bankrupt, returning from examination, for the purpose of leaving his books at the house of the assignee, will deprive him of his privilege, *Quære*. *Ex parte Donlevy*, Vol. VII. *Ibid*.

10. Solicitor arrested in his return from attending the master discharged in the original action and subsequent detainers. The proper course is an order upon all the plaintiffs to discharge him. *Ex parte Ledwick*, Vol. VIII. 598. See PEER 3.

11. Where an attorney was arrested on his return from Lincoln's Inn Hall, where he had been attending on his client's business, the Chancellor, sitting in bankruptcy,

examined the parties on oath himself, and ordered him to be discharged. *Gascoyne's case*, Vol. xiv. 184.

12. A solicitor arrested on his way from his residence to Lincoln's Inn, without deviation, for the purpose of attending a bankrupt petition as solicitor, discharged on personal examination by the Lord Chancellor; the oath administered by the register: but to be entitled in the bankruptcy. *Castle's case*, Vol. xvi. 412.

13. Gaoler retaking a prisoner who had escaped held not to be a contempt, although the party was returning from his examination before the Commissioners of Bankrupt under the Chancellor's order, after the time prescribed by the statute; and the court refused to discharge him. *Johnson ex parte*, Vol. xiv. 36.

14. The Chancellor's order is not mandatory upon the bankrupt; and if he does not surrender it is not a contempt. *Ibid.* 40.

And see BANKRUPT, [S.] 4, *et seq.*

ASSETS.

And see ADVOWSON, 3.—EXECUTOR, [A.] 54.—TIMBER, 2.—VENDOR AND PURCHASER, [A.] 3. 13.

1. Executors may dispose of a lease for years, as assets, notwithstanding a proviso or covenant that lessee shall not alien. *Seers v. Hind*, Vol. i. 294.

2. At law, the person is often sued in respect of the assets in equity the assets themselves. *Isaac v. Humpage*, Vol. i. 430.

3. Devise in trust to sell for payment of debts and funeral expenses,

with a particular disposition of the surplus money; the personal estate not being otherwise disposed of than by the appointment of an executor, who was not one of the trustees, is first liable to the debts, &c. especially as the produce of the sale was not sufficient for them. *Gray v. Minnethorpe*, Vol. iii. 103.

4. Under a devise to sell and pay debts and funeral expenses the personal estate was exempted without any express words upon the evident intention. *Burton v. Knowlton*, Vol. iii. 107.

Where there is an express direction in a will, that the debts, &c. shall be paid out of the real estate, the person, to whom the personal is bequeathed, takes it exempt. *Ibid.* 111.

5. To exempt the personal estate under a devise for payment of debts the intention must appear plainly on the will: and the Court cannot look to intrinsic circumstances. *Brummel v. Prothero*, Vol. iii. 111.

6. Though a general charge of debts upon a devised estate will not prevent the previous application of an estate descended; yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended: but this arrangement does not bind the creditor. *Manning v. Spooner*, Vol. iii. 114.

7. The personal property of an intestate, wherever situated, must be distributed by the law of the country where his domicile was; which is *prima facie* the place of his residence: but that may be rebutted and supported by circumstances. *Bempde v. Johnstone*, Vol. iii. 198.

8. Personal estate not exempted from debts, &c. by a charge upon real. *Burnaby v. Griffin*, Vol. iii. 266.

9. To exempt personal estate from

debts, the intention must be manifest. *Ibid.* 477.

10. Real estates devised held liable to simple contract debts under a direction in the beginning of the will, that debts and funeral expenses should be first paid: that, which descended to the heir by the failure of the devise, to be first applied. *Williams v. Chitty*, Vol. III. 545.

11. No difference between debts and legacies in an implied charge upon real estate by will. *Ibid.* 551.

12. Devise after payment of debts: the debts are charged. *Shallcross v. Finden*, Vol. III. 738.

13. Distinction between debts and legacies in an implied charge upon an estate specifically devised. *Ibid.* 739.

14. Notwithstanding declaration of the testator to his executor that he never meant to call for payment of a promissory note, it was held part of the assets; which were insufficient for the legacies; a charge on the real estate failing for want of a proper attestation of the will. *Byrn v. Godfrey*, Vol. IV. 6.

15. Testator, after giving an annuity and legacies, devised her real estate, subject to the said annuity and legacies, and her debts and funeral and testamentary expenses, and the debts of her late brother. The assets were marshalled in favour of a legatee by a codicil. *Norman v. Morrell*, Vol. IV. 796.

16. Upon the administration of assets no question ought to be determined in equity, till it is first determined whether there is a good debt at law. *Kennell v. Abbott*, Vol. IV. 815.

17. An equity of redemption is not equitable assets, at least as against judgment creditors who have a right to redeem. *Sharpe v. E. of Scarborough*, Vol. IV. 538.

Assets are not marshalled against judgment creditors. *Ibid.*

18. Upon a deficiency of assets administered in this Court, a value must be set upon an annuity at the time of the death, and the annuitant can only claim in respect of that. *Franks v. Cooper*, Vol. IV. 763.

19. The personal estate being sufficient for the debts, though not equal to the discharge of legacies in full, and the real estate being devised, the Court would not, under a direction to the executors "to pay the debts and funeral expenses as soon as conveniently may be," marshal the assets in favour of the legatee. *Keeling v. Brown*, Vol. V. 359.

20. General rule, that where personal property is bequeathed for life with remainders over, and not specifically, it is to be converted into the 3 per cents. subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle. *Howe v. Earl of Dartmouth*, Vol. VII. 137.

21. The Court, in laying out money in the funds, does not attend to the difference in the price of stock. *Ibid.*, Vol. VII. 151.

22. A charge for payment of debts makes equitable assets. *Bailey v. Elkins*, Vol. VII. 319.

23. Simple contract debts not charged upon real estate by a will, first devising, that all his debts and funeral expenses might be satisfied and paid by his executors; all the real estate being specifically devised. Assets marshalled. *Powell v. Robins*, Vol. VII. 209.

24. The decree affirmed on a rehearing: the money not being impressed with a real character, and clothed with real uses, immediately upon the execution of the deed was

in the event, that happened, not considered as land. *Wheldale v. Partridge*, Vol. VII. 227.

25. Money being once clearly impressed with real uses, and one of those uses being for the benefit of the heir, the impression will remain for his benefit; and, to put an end to it, in a question between the heir and executor, either the money must come to the possession of the person, from whom they claim in those characters, or, he must, if it is in the hands of a third person, do some act, denoting a change of intention. *Ibid.* Vol. VII. 235.

26. Direction by will to sell real estates, and after the sale to pay certain legacies, held upon the will not a conversion out and out, so that the surplus produce would pass by an unattested codicil. To produce that effect, an intention must be collected from the will duly attested to pass that surplus under terms *prima facie* descriptive of personal property only, but upon the whole will intended to pass such surplus. *Sheddon v. Goodrich*, Vol. VII. 481.

27. General residuary bequest, including a leasehold farm, with the stock, to be converted into money as soon as conveniently may be, upon trust to pay the interest, &c. for life, and as to the capital for the children. The stock being considerably increased between the death in April and the sale at Michaelmas, it was decreed, that the conversion was in a reasonable time, and the party entitled for life should have interest from the conversion; and as to premises, that from a defect of title could not be sold, that, being for the interest of all, that they should not be sold, a value should be set upon them, to carry interest at 4 per cent. from the death. *Gibson v. Bott*, Vol. VII. 89.

28. The old practice, to administer the personal estate before a sale of real estate, charged in aid, relaxed. Now if the master foresees a deficiency, a sale is permitted. *Holme v. Stanley*, Vol. VIII. 2.

29. In the administration of assets ordinarily the first fund applicable is the personal estate, not specifically bequeathed: then land devised or ordered to be sold for payment of debts; not merely charged: then descended estates; then lands charged with the debts. The distinction is between a mere charge upon the real estates, and proposing the mode, in which the debts are to be paid. *Harmood v. Oglander*, Vol. VIII. 124, 5.

30. A charge makes equitable assets. *Shiphard v. Lutwidge*, Vol. VIII. 26.

31. Mortgagee of freehold and copyhold estates, also a specialty creditor, having exhausted the personal assets, simple contract creditors are entitled to stand in his place *pro tanto* against both the freehold and copyhold estates: the case of *Robinson v. Tonge* being over-ruled. *Aldrich v. Cooper*, Vol. VIII. 382.

32. Instances of the rule, that a person having a double fund, shall not by his option disappoint another, who has only one. *Ibid.* Vol. VIII. 388. 395.

33. Principle that a creditor having two funds shall take to that, which, paying him, will leave another fund for another creditor. Vol. VIII. 391.

34. Leasehold estates specifically bequeathed to an executor were by him assigned as a security for his own debt. That assignment, no collusion appearing, was established against a creditor. *Taylor v. Hawkins*, Vol. VIII. 209.

35. Rule as to the application of

assets. Where the will, going beyond a mere charge, creates a particular fund for payment of debts, that shall be first applied, in exoneration of descended estates, whether acquired after the date of the will, or not, and of the personal estate, even in favour of the next of kin, taking it for want of disposition. *Milnes v. Slater*, Vol. VIII. 295.

36. The rule as to the exoneration of estates descended by a devise for the payment of debts holds, even though the estate devised may be equitable assets, and the descended estates legal assets. *Ibid.* VIII. 304.

37. The personal estate can be exempt from the debts only by declaration plain, or necessary inference. *Ibid.* 305.

38. A mere charge upon a devised estate will not protect a descended estate from being applied first. *Ibid.* 306.

39. Under a decree by a separate creditor against the assets of a deceased partner, and the surviving one having become bankrupt, the joint creditors claimed to come in *pari passu* with the separate creditors of the deceased against his separate estate, held that the separate creditors were entitled to the separate estate, and the joint creditors to the surplus. *Gray v. Chiswell*, Vol. IX. 118.

40. Power executed in favour of volunteers (natural children) is assets for creditors; but a purchaser of a specific part of the property, having as good an equity as a creditor who has no specific charge upon it, was held entitled. *George v. Milbank*, Vol. IX. 190.

A voluntary settlement making provision for debts, would be good against all future creditors. *Ibid.* 194.

41. The general rule for the conversion of personal property, bequeathed for life, with remainders

over into the 3 per cents. held not to attach upon property of a testator, who died in India, under his will, made there, invested by his executor in the Company's securities there; but on the arrival of the parties in this country a decree was made, that it should be remitted, and invested accordingly. *Holland v. Hughes*, Vol. XVI. 111.

42. Effect of length of time against a demand in respect of misapplication of assets by the executor. *M'Leod v. Drummond*, Vol. XVII. 165.

Security by executor upon the assets for his own debt and future advances, with other circumstances proving the act not to be consistent with the duty of executor, but for his own advantage, cannot be held. *Ibid.* 168.

Testator's effects cannot be taken in execution for the executor's debt. *Ibid.*

Pledge of the assets by an executor cannot be held, even against a pecuniary or residuary legatee; and though for money advanced at the time, if under circumstances showing knowledge of an intended application, not conformable to, or connected with, the character of executor.

Distinction between an antecedent debt, and a present advance in the consideration, not conclusive. *Ib.* 170.

43. Leases for lives distributable as personal estate where there is no special occupant, or where the executor is the special occupant. *Milner v. Lord Harewood*, Vol. XVIII. 273.

And see APPROPRIATION, 1.—BARON AND FEME, [A.] 12.

ASSIGNMENT.

1. Assignment of property retaining possession, fraudulent, against creditors. *Dutton v. Morrison*, Vol. XVII. 197.

2. The Court has perhaps gone too far in permitting assignments of rights in accounts to be taken. Such a right cannot be parcelled out; so that every person may file a bill. *Spragg v. Binkes*, Vol. v. 589.
And see BANKRUPT [H.]: [I.]

ASSUMPSIT.

Conveyance or delivery is necessary to support a general *indeb. assumpsit*. *Spurrier v. Mayoss*, Vol. i. 530.

ASSURANCE.

1. A subject of this country cannot enter into an assurance, which will have the effect of protecting property belonging to persons, subjects of a hostile country; proof therefore expunged. *Ex parte Lee*, Vol. XIII. 64.

2. But where the contract was originally good, but the right to recover suspended by war, Court allowed the claim to be admitted, but the dividend reserved. *Ex parte Boussmaker*, Vol. XIII. 71.

And see INSURANCE, *passim*.

ATTACHMENT.

See PRACTICE, [O.] *passim*.

ATTAINDER.

Petition of the bankrupt attainted under a conviction of felony, under 5 Geo. 2. c. 30, to supersede, dismissed, on the ground that a person attainted can only be heard in a court of justice for the express purpose of reversing the attainder. *Ex parte Bullock*, Vol. XIV. 452.

Quære, if a commission can issue against a person so attainted. *Ibid.*

ATTESTATION.

See WILL, [A.] *passim*.

ATTORNEY AND SOLICITOR.

[A.] PRIVILEGES AND DUTIES.

[B.] LIEN.

[C.] BILL—TAXATION.

And see ATTORNEY AND CLIENT, *infra*.

[A.] PRIVILEGES AND DUTIES.

1. An attorney may practise though a bankrupt. *Ex parte Brown*, Vol. II. 68.

2. Attorneys are officers of the Court, and have several privileges as such; and there are summary proceedings both for and against them, and peculiar restraints on them in their dealings with their clients both at law and in equity; at law a judgment obtained by an attorney from his client would only stand as a security for what is actually due. *Newman v. Payne*, Vol. II. 201.

3. Attorney examined as a witness must disclose acts done in his presence by his client, as of execution of a deed, &c. not private confidential conversation as the reasons for making it, &c. on motion to suppress the depositions referred to see what part came to his knowledge, as confidential attorney, in order to have that suppressed. *Sandford v. Remington*, Vol. II. 189.

4. A settled account between attorney and client, opened upon general allegations by the client of errors, admitted, although no specific errors pointed out. *Matthews v. Wallwyn*, Vol. IV. 118.

And see AGENT, [C.] 4.

Attorney not struck off on his own application without affidavit. *Ex parte Owen*, Vol. VI. 11.

Court will order him to deliver his bill, for the purpose of obtaining title-deeds in his hands. *Ex parte Earl of Uxbridge*, Vol. VI. 425.

5. Motion to compel an attorney

to produce papers of his client, refused with costs. *Wright v. Mayer*, Vol. vi. 280.

6. No *subpoena duces tecum* upon an attorney to produce papers of his client. It has been sometimes seen in a criminal case; but is not to be followed. *Ibid.* Vol. vi. 282.

7. Bill by a clerk in Court against a solicitor for payment of a certain sum, stated as the amount of the plaintiff's bill for fees and disbursements. Demurrer to the relief overruled. *Barker v. Dacie*, Vol. vi. 681.

8. Solicitors, modern officers of the Court compared with clerks in Court. *Ibid.* 687.

9. A solicitor suing for his bill need not state all the circumstances required by the statute 2 G. II. c. 23, s. 22, being matter of evidence. *Worrall v. Harford*, Vol. viii. 9.

10. A solicitor not to be struck off the roll at his own request without an affidavit, that there is no other reason for the application. *Ex parte Foley*, Vol. viii. 33.

11. Solicitor ordered to pay all the costs, occasioned by his refusing to appear for the defendant at the hearing, pursuant to his undertaking, and the costs of the application. *Cook v. Broomhead*, Vol. xvi. 133.

12. Attorney cannot be changed without leave of the Court; whether he can relinquish the suit, though not paid, and as to the effect of taking security, *Quere.*

Effect of his notice to defendant not to pay over money under a decree or judgment, without satisfying his costs. *Cowell v. Simpson*, Vol. xvi. 281.

[B.] LIEN.

And see LIEN, 12, *et seq.*

1. Where an attorney recovered a sum for his client, which was afterwards ordered by the Court to be

appropriated to satisfy a claim established against his client, held that it must be subject to the attorney's lien for his costs. *Taylor v. Popham*, Vol. xiii. 59.

2. A solicitor has a lien for his costs upon the papers in the cause, but he cannot prevent the hearing of the cause until his costs be paid. So at law, a party may change the attorney, or discontinue his action, subject to the costs incurred. *Merryweather v. Mellish*, Vol. xiii. 161. *S. P. Twort v. Dayrell*, *Ibid.* 195.

3. A solicitor declining to proceed, cannot claim a lien for his bill. *Cresswell v. Byron*, Vol. xiv. 271.

4. The order, establishing the solicitor's lien for costs upon the fund of assets, appropriated to the client, subject to securing a debt from him, and the testator as his surety, and afterwards paid by the estate of the latter, was reversed, as being inconsistent with the decrees. *Taylor v. Popham*, Vol. xv. 72.

5. In equity the costs are arranged according to the equities of the parties; and the solicitor's lien is only upon the balance under that arrangement. *Ibid.* Vol. xv. 72.

6. As to the reason of some cases at law, in favor of the attorney's lien for costs, going the length of preventing compromise, *Quere. Ibid.*

7. Deeds deposited with a solicitor for a particular purpose, and after that had failed, permitted to remain with him, subject to the general lien. *Ex parte Pemberton*, Vol. xviii. 282.

8. Whether an attorney's lien upon papers extends to the original will of his client, *Quere.* Ordered to produce it before the examiner, and for the hearing of the cause without prejudice. *Georges v. Georges*, Vol. xviii. 294.

And see BANKRUPT [W.]

[C.] BILL.

And see COSTS, 12.

1. Proceedings before the Lord Chancellor, as visitor of a royal foundation, not proceedings in law or equity within the statute for taxing bills of costs. *Ex parte Dann*, Vol. ix. 547.

2. Solicitor allowed the costs of taxation, the reduction being less than one-sixth: but his conduct in the master's office having been, if not vexatious, yet creating useless expense, he was ordered to pay part of those costs. *Yea v. Frere*, Vol. xiv. 154.

3. It is not of course to order taxation after the bill has been settled and paid, but under special circumstances, as of fraud, neither payment, release, nor a judgment for the amount, will preclude taxation. *Langstaffe v. Taylor*, Vol. xiv. 262.

ATTORNEY AND CLIENT.

And see AGENT AND PRINCIPAL,
[D.] 4.—FRAUD, 25.

1. Securities taken by an attorney from his client during their connexion as such for a present, the balances of account settled for money lent and laid out, costs, and business done, and the price of a horse sold, declared void as to the present; and the plaintiff submitting to pay what should be actually due, the accounts were opened as to the whole: the horse having been sold soon after he was purchased from the attorney for a price much less than was then stipulated, inquiry into his value directed. *Newman v. Payne*, Vol. ii. 199.

2. Principle of relief against transactions between attorney and client, with misrepresentations from

knowledge, acquired in the client's transactions or assumed, considered either as misconduct or negligence. *Montesquieu v. Sandys*, Vol. xviii. 308.

Whether a deficiency in value of one-third, with breach of duty as an attorney, &c. is not sufficient to set aside a purchase from his client, *Quere. Ibid.* 312.

An attorney shall not take a gift or reward from his client while the connexion subsists. It must, as in the instance of guardian and ward, be previously dissolved. *Ibid.* 313.

3. The circumstance that one residuary devisee was the attorney who drew the will, not decisive evidence of fraud. *Paine v. Hall*, Vol. xviii. 475.

4. False representation by bankers that they have laid out money in the funds, indictable as a conspiracy. *Auriol v. Smith*, Vol. xviii. 203.

5. Beneficial contracts and conveyances, obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, being also liable to the charge of *champerty*, decreed to stand as security only for what was actually due; and purchases by the attorney declared a trust, a subsequent deed, not a separate independent voluntary transaction, but under the same pressure, and called for under the covenant for farther assurance, no confirmation. *Wood v. Downes*, Vol. xviii. 120.

Attorney cannot take any thing from his client for his own benefit pending the suit, but his demand; nor a guardian from his ward pending the guardianship, nor at its close, nor until the relation and influence have ceased in either case. *Ibid.* 127.

6. Purchase of reversionary interest by an attorney from his client,

AWARD.

though in the event advantageous without fraud or any representation, the proposal coming from the client, and no confidence upon that subject, both ignorant of the value; the bill charging fraud, misrepresentation, confidence, and knowledge on one side, with ignorance on the other, and not bringing forward the only incorrect circumstance, the receipt taken as for money paid, though the consideration was by deduction from a bill of costs, not then of that amount, dismissed without costs. *Montesquieu v. Sandys*, Vol. xviii. 304.

7. An attorney or solicitor cannot give up his client, and act for the opposite party in any suits between them. *Earl Cholmondeley v. Lord Clinton*, Vol. xix. 261.

8. Attorney prevented from communicating his client's secrets even by striking off the roll; not permitted to give evidence of them. *Ibid.* 263.

9. As to preventing the clerk of an attorney or solicitor from giving evidence of facts come to his knowledge in that service, *Quære*. Distinction, where he afterwards becomes partner. *Ibid.* 272.

10. Solicitors in partnership cannot dissolve their partnership, as against their client, without his consent, so as to enable the retiring partner, as discharged, to act against him. *Ibid.* 273.

11. Practice of solicitors, partners, dividing their business, considering one only as agent to the other, disallowed; the client being entitled to their united exertions. *Ibid.* 273.

AWARD.

And see CHARITY, 51.—PRACTICE, [E.] 1.—THEATRE, 1.

1. Arbitrator not to consider him-

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self agent for the person who appoints him. *Calcraft v. Roebuck*, Vol. i. 226.

2. Parties to award are bound by it. *Price v. Williams*, Vol. i. 365.

3. An arbitrator on a general reference may go farther than the Court could, to do complete justice, and may therefore relieve against a harsh right, which in a Court might prevail; a party may impeach the award for corruption or gross mistake, not for erroneous judgment. But arbitrator on a reference to inquire into facts, &c. is as a master, and the Court will draw the conclusion; or if he has done it, will see that it is right. *Knox v. Symonds*, Vol. i. 369.

Exceptions may, with leave of the Court, be taken to an award upon reference to inquire into facts; if allowed, the Court will refer it to a master, but not back to the arbitrator without consent. *Ib.* 370, n.

4. Award upon a general reference cannot be impeached for erroneous judgment upon facts, but may for corruption, misbehaviour, excess of power, and mistake by the arbitrators, in the three first cases evidence must be satisfactory, as the Court favours awards; award contrary to law may be impeached as an excess of power, not for allowing compound, as it may arise by express, or implied from the dealings of the parties; it being a conclusion of fact, and within the judgment of the arbitrators. This doctrine as to interest, has relation to mortgages. *Morgan v. Mather*, Vol. ii. 15.

5. Parties litigatory may, by consent, take arbitrators instead of a master. *Ibid.* Vol. ii. 22.

6. But then they must proceed as the master, and make the same report. *Dick v. Milligan*, Vol. ii. 23.

7. Such reference is not in the nature of a reference to the master,

therefore the parties are bound by a general award of a balance due without particulars stated, nor will Court require particulars merely as a ground for costs. *Ibid.* 23.

Matter of exception to an award must be confined to what arises on the face of it, compared with the proceedings in the cause, and cannot be introduced by affidavit; any thing *dehors* charging misconduct, &c. must come upon motion to set it aside, and there cannot be a partial inquiry. *Ibid.* 24.

By reference the Court both at law and equity divests itself of all judgment upon the facts. *Ibid.* 24.

8. Covenant to refer, only entitles to damages; but is no bar to a suit or action, as a covenant that there should be no suit at law or in equity would be. *Mitchell v. Harris*, Vol. II. 132.

9. A mere agreement to refer, when no reference has taken place, cannot take away the jurisdiction of any Court. *Ibid.*

Award pleaded would be examined in a Court of law, as well as of equity. *Ibid.*

10. Bill showing that a judgment at law was obtained against conscience by concealment, would open it. So an award would be opened in equity, if impeached upon equitable matter as concealment, notwithstanding a clause that it should be final. *Ibid.*

11. Bill lies to set aside for fraud an award made a rule of a court of law under 9 and 10 W. III. c. 15. *Lord Lonsdale v. Littledale*, Vol. II. 451.

12. An award in a cause depending is not within the statute. *Ibid.* Vol. II. 451.

13. Upon an award made a rule of a court of law, one term being, that no bill in equity shall be filed,

the court of law has a discretion to enforce that term or not. *Ibid.*

14. Arbitrator combining shall pay costs. *Ibid.*

15. Award not to be set aside, because the arbitrator made use of the judgment of another person. *Emery v. Wase*, Vol. V. 848.

16. Order after an award to make the submission a rule of court. *Pownall v. King*, Vol. VI. 10.

17. Upon a reference to arbitration, if the award is not made in the time and manner stipulated, no case at law or in equity that the court has substituted itself for the arbitrators, and made the award; even where the substantial thing to be done is agreed between the parties; still less where any thing substantial is to be settled by the arbitrators. *Ibid.* Vol. VI. 34.

18. Award set aside, the arbitrator having received evidence after notice to the parties, that he would receive no more; in which they acquiesced. *Walker v. Frobisher*, Vol. VI. 70.

19. Under a reference to settle the matter in difference, and award such alterations in the defendant's works as to the arbitrator should seem necessary, regard being had to their state at a particular period, an award directing no other alteration than that parts of the machinery which were made of wood should be made of cast iron, was held a due execution of the authority. *Ibid.*

20. An award cannot be disturbed for mistake upon a question of law referred. *Ching v. Ching*, Vol. VI. 282.

21. To a bill for discovery and relief plea of an agreement to refer to arbitration over-ruled. *Street v. Rigby*, Vol. VI. 815.

22. Bill for specific performance

of an agreement to refer to arbitration does not lie. *Ibid.* 818.

23. Courts of equity will not be ancillary to arbitrators, in permitting the party to take relief from them, coming to the court for discovery. *Guest v. Homfray*, Vol. vi. 821.

Agreement to refer does not bar an action. *Ibid.*

24. It is of no consequence that the reference is not made a rule of Court until after the award; nor is it a ground for setting it aside, that the solicitor takes upon him to say he cannot attend, or that the award was prepared by the solicitor of one party: but where the circumstances were such as might have been relieved upon application made, where the reference was made a rule of Court, the Court, without saying it had no jurisdiction, refused to interpose, and dissolved the injunction. *Fetherstone v. Cooper*, Vol. ix. 67.

25. Where, upon a general reference, the arbitrator meaning to decide according to law, mistakes, the Court will set that right; but if parties choose to refer a naked question of law to a person to decide the question between them, instead of having the decision of a Court, the Court will not interfere. *Young v. Walter*, Vol. ix. 364.

26. Arbitrator may clearly take the account, notwithstanding an admission of assets: it is within his jurisdiction, whether there is, in fact, such a mistake as he should relieve against. *Ibid.* 365.

27. Arbitrator may proceed *ex parte*, where one party, duly summoned, will not attend. *Wood v. Leake*, Vol. xii. 412.

28. Where an agreement to refer matters pending in Chancery was made a rule of court of K. B., the latter derive jurisdiction from the statute alone. The Court refused

to grant an injunction. *Nichols v. Chalie*, Vol. xiv. 265.

Though the clause of the act only states "corruption or undue means," the courts have always determined whether there was a mistake in law on the part of the arbitrator. *Ibid.* 271.

A party cannot, by agreement to refer, deprive himself of the right to apply to a court of equity.

29. Court of equity will not interpose to stay process of a court of law, in which the award was made a rule of Court under the statute. *Gwinnett v. Bannister*, Vol. xiv. 530.

30. Objection to an award to be ready to be delivered in writing to the parties by a certain day, as not having a deed stamp, overruled. *Blundell v. Brettargh*, Vol. xvii. 232.

31. No case at law or in equity, that if an award is not made at the time and in the manner stipulated, the Court have substituted themselves for the arbitrators, and made the award, even where the substantial thing to be done was agreed by the parties; but the time and manner left to others to prescribe. *Blundell v. Brettargh*, Vol. xvii. 242.

32. Parol submission to arbitration not within the statute 9 and 10 Will. and Mary, c. 15. ——— v. *Mills*, Vol. xvii. 419.

33. As to the jurisdiction in equity against an award under a reference, made a rule of a court of law for misconduct of the arbitrators, &c., where the bill was filed before the rule made in the court of law, *quære*. ——— v. *Mills*, Vol. xvii. 419.

34. Declaration of one of the arbitrators, that had he seen a letter, of which, being mislaid at the time, the contents were proved, he would have acted otherwise, not

sufficient against an award. The ground of mistake, admitted evidence, and set aside by the Court. *Anderson v. D'Amey*, Vol. xviii. 447.

AUCTION & AUCTIONEER.

1. At an auction one person only bid for the vendor to 75*l.* an acre upon a private notice to the auctioneer: then after a contest with real bidders, the estate was bought at 101*l.* 17*s.* an acre; and the purchaser some days afterwards paid the duty: he was decreed to perform the contract with costs. *Bramley v. Alt*, Vol. iii. 620.

2. Where all the bidders at an auction, except the buyer, are bidding for the seller without notice, and the buyer is thereby induced to give more than the value, neither courts of law nor equity will support it. *Ibid.* 624.

3. No objection to a sale by auction, that persons were employed by the vendor to bid for him without public notice. *Ibid.* 627.

4. Bill for specific performance of a purchase by auction dismissed by Lord Rosslyn with costs, merely as being a hard bargain, from inadequacy of value. Upon a rehearing, Lord Eldon was of opinion, that was not a sufficient ground for refusing a specific performance of a purchase by auction, without something more, as fraud or surprise, &c. But the decree was not affected upon another ground; that, a material witness being incompetent, the bill was not supported by evidence. *White v. Damon*, Vol. vii. 30.

5. Sale of land by auction is within the statute of frauds; and the name of the vendee being put down by the auctioneer is not suf-

ficient. *Buckmaster v. Harrop*, Vol. vii. 341. See AGREEMENT, 60.

6. Sales by auction within the statute of frauds. *Higginson v. Clowes*, Vol. xv. 521.

And see AGENT, [A.] 6.—FRAUDS, STAT. OF, 13, *et seq.*—WITNESS, 6—

BAIL.

1. Plaintiff at law has a right to hold the defendant to bail upon his own affidavit: but there have been cases in which the court of law has permitted an explanation of the circumstances by the affidavit of the defendant, particularly between foreigners and upon foreign transactions; and where an abuse of the process appeared, has directed common bail to be filed. *De Carriere v. De Calonne*, Vol. iv. 590.

2. Defendant cannot be held to bail a second time for the same cause. *Amsink v. Barklay*, Vol. viii. 569.

BANK OF ENGLAND.

1. The Bank of England are not to look beyond the legal title to the trusts of a will: and cannot, therefore, prevent the executor from selling out or transferring stock into his own name. *Bank of England v. Parsons*, Vol. v. 665.

2. Notwithstanding 39 and 40 Geo. III. c. 3. the Bank may still be made parties to a bill to restrain a transfer filed since that act. A demurrer by the Bank was therefore overruled. *Temple v. Bank of England*, Vol. vi. 770.

3. An application under that act, to restrain the Bank from making a transfer without making them parties, must be upon notice to the

BANKER.

defendants, or on affidavit, as in cases of waste. *Hammond v. Maundrell*, Vol. vi. 773.

4. Distinction between the books of the Bank of England and records. *Auriol v. Smith*, Vol. xviii. 203.

BANK STOCK.

1. Bank stock specifically bequeathed to A. in trust to pay a bond debt to himself; and as to the rest, for B. for life; remainder over: the trustee being also executor, transferred to persons not entitled under the will: the Bank is not chargeable. *Hartga v. The Bank of England*, Vol. iii. 55.

2. Bonus on bank stock considered as capital, not profit to which tenant for life was entitled. The Lord Chancellor disapproving, but following the former decisions. *Paris v. Paris*, Vol. x. 185. *S. P. Clayton v. Gresham*, Vol. x. 288.

3. Bonus on bank stock held to be taken as part of the capital, and tenant for life only entitled to the interest of it. *Witts v. Steele*, Vol. xiii. 363.

BANKER.

1. Where banker's check is given and paid away for valuable consideration, or to a creditor, executor is liable; and if person to whom it is given receives it before the banker has notice of the death of the drawer, it cannot be recalled. *Tate v. Hilbert*, Vol. ii. 118.

2. Reasonable commission 2s. 6d. per cent. allowed to a country banker on discounts, though for a person resident in London, and paid through a banker there, is not colourable. *Ex parte Jones*, Vol. xvii. 332.

3. Short bills in the hands of a

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banker are specifically the property of the remitter, subject to a lien for the balance of the account. *Rowton ex parte*, Vol. xvii. 431.

BANKRUPT.

[A.] JURISDICTION OF THE COURT.

[B.] TRADING.

[C.] ACT OF BANKRUPTCY.

[D.] PETITIONING CREDITOR — DEBT—BOND.

[E.] DOCKET, STRIKING THE.

[F.] COMMISSION.

[G.] COMMISSIONERS — POWERS — PRIVILEGES.

[H.] ASSIGNMENT—EFFECT OF.

[I.] ASSIGNEES — CHOICE — REMOVAL—POWERS—DUTIES.

[K.] PROOF.

[L.] ELECTION OF CREDITOR.

[M.] SURRENDER.

[N.] CERTIFICATE.

[O.] SUPERSEDEAS.

[P.] IN CASE OF PARTNERS.

[Q.] ——— MORTGAGES AND OTHER SECURITIES.

[R.] ——— JOINT AND SEVERAL COMMISSIONS.

[S.] RIGHTS AND PRIVILEGES OF BANKRUPT.

[T.] ——— OF BANKRUPT'S WIFE.

[U.] SET OFF AND MUTUAL CREDIT.

[V.] STATUTE 21 JAC. S. 19.

[W.] SOLICITOR.

[X.] MESSENGER.

[Y.] ACTIONS AND SUITS IN BANKRUPTCY.

[Z.] ORDERS ———.

[AA.] PETITIONS

[BB.] INTEREST, WHEN GIVEN.

[CC.] COSTS.

[A.] JURISDICTION.

1. The jurisdiction of the Lord Chancellor in bankruptcy is distinct from that of the Court of Chancery. Vol. vi. 782.

2. The jurisdiction in bankruptcy is under a special authority, distinct from that of the Court of Chancery. *Phillips v. Shaw*, Vol. viii. 250.

3. Jurisdiction in bankruptcy legal and equitable. *Ibid.* Vol. xv. 496.

4. Jurisdiction in bankruptcy on the petition of persons claiming, not under the commission, but against it, specific property. *Ex parte Pease*, Vol. xix. 25.

5. Jurisdiction in bankruptcy beyond the statutes. *Ex parte Cawkwell*, Vol. xix. 234.

6. Legal and equitable jurisdiction of the Lord Chancellor in bankruptcy more by practice than authority. *Ex parte Roffey*, Vol. xix. 469.

Administration in bankruptcy both legal and equitable. *Ib.* 471.

7. Distinction between the jurisdiction in the Court of Chancery and in bankruptcy. *Ex parte Smith*, Vol. xix. 473.

8. The Lord Chancellor, in bankruptcy, holds an even hand between the Crown and the creditors. *Ex parte Mavor*, Vol. xix. 541.

And see *infra* [V.] 1: and [X.] 2.

[B] TRADING.

1. The owner of a share in a ship is not, in that character, subject to the bankrupt laws. *Ex parte Bowes*, Vol. iv. 168.

2. Commission cannot be supported by a trading during infancy; very slight degree of trade will be sufficient, if indicating an intention to deal generally. *Maule ex parte*, Vol. xiv. 603.

3. An underwriter, merely as such, cannot be a bankrupt. *Ex parte Bell*, Vol. xv. 355.

4. So holders of stock in public companies. *Ibid.* 357.

[C.] ACT OF BANKRUPTCY.

1. Whether lying two months in

prison, charged in actions for debts, and being surrendered in discharge of bail, can constitute an act of bankruptcy; the original commitment being under a criminal sentence; during which the party was so charged. *Ex parte Bowers*, Vol. iv. 168.

2. Though a commission of bankruptcy cannot stand upon a concerted act of bankruptcy, it may be supported, if any other act of bankruptcy, not liable to that objection, has been committed; and the pivity of the bankrupt is no objection: nor, that the object of the commission is to defeat an execution. *Ex parte Edmonson*, Vol. vii. 303.

3. Witnesses to prove the act of bankruptcy not having obeyed the summons of the commissioners, an order was made, that they should attend the commissioners. *Ex parte Lund*, Vol. vi. 781.

4. The fraction of a day is material in determining whether the commission issued after the act. After a verdict upon an issue, by which they were found to have been on the same day, the Court directed a new trial upon the issue altered, whether the act was committed before the time of issuing the commission. *Wydown's Case*, Vol. xiv. 80.

A commission may be sealed in the night. *Ibid.* 87.

5. It is sufficient, if there be an act of bankruptcy before the issuing and the awarding and sealing the commission; the statute does not require, though it is according to the practice, to make affidavit at the time of striking the docket, of the belief that the party is a bankrupt at that time. *Ibid.*

6. Act of bankruptcy by a man who had retired from trade, but during the existence of a debt con-

tracted while in trade, will sustain a commission. *Dewdney, Ex parte*, Vol. xv. 495.

7. Act of bankruptcy committed after retiring from trade sufficient. *Ex parte Bamford*, Vol. xv. 449.

8. Act of bankruptcy by quitting the dwelling-house with the intention of delaying a creditor, though under a groundless apprehension. *Ibid.*

9. Act of bankruptcy by denial to a servant calling for a debt by the direction of the acknowledged agent of the creditor, and by the appointment of the debtor; and though the debtor was seen by the person applying through the window of a partition, and heard giving directions to deny him. *Ibid.*

10. A concerted act not available, except the creditors not privy to it. *Bourne ex parte*, Vol. xvi. 145.

11. Commission upon a concerted act may be supported by another act. *Bourne ex parte*, Vol. xvi. 145.

12. Assignment of all property, though for the satisfaction of all the creditors, an act of bankruptcy, *Ibid.*

13. Circumstances amounting to an act of bankruptcy, by keeping house, viz. not going to his counting-house, nor into the town near which he lived; sending for his papers to his house, and not going out, except taking an evening walk in the country. *Ibid.*

14. Trader, having privilege of parliament, by not paying money under an order of Court, commits an act of bankruptcy by stat. 45 Geo. 3. c. 124. *Read v. Philips*, Vol. xvi. 437.

15. Assignment by partners by deed of property, proved to be all their property in trust for their creditors, with a proviso, to be void, if all the creditors for above 20*l.* should not execute, or a commission of bankruptcy should issue within a

certain time, is an act of bankruptcy; not where the deed being joint and not several, one never executed. *Dutton v. Morrison*, Vol. xvii. 193.

16. Denial to a creditor with subsequent approbation, if not connected with previous direction, or if, in the interval, the debtor had seen and conversed with the creditor, not an act of bankruptcy. *Ex parte Foster*, Vol. xvii. 416.

17. Shutting up a banker's shop not an act of bankruptcy, by a partner residing in another place. *Ex parte Mavor*, Vol. xix. 553.

18. Order for production before commissioners of bankruptcy of a deed of trust, alleged to be an act of bankruptcy: but if the petitioning creditor knew of and acquiesced under it, though he did not execute, it will not support the commission. *Ex parte Cawkwell*, Vol. xix. 233.

19. Act of bankruptcy on parol evidence of a deed which cannot be produced. *Ibid.* 234.

[D]. PETITIONING CREDITOR.—DEBT.—BOND.

And see *infra* [O], 4.

1. Commission of bankrupt an execution for all creditors. The petitioning creditor therefore cannot receive his debt, and the commission be superseded, while the others are unsatisfied. *Stokes, Ex parte*, Vol. vii. 408.

2. The presence of the petitioning creditor at the meeting to declare the party a bankrupt, as required by a general order of Lord Rosslyn, 26th November, 1798, dispensed with upon circumstances. *Ex parte Edwards*, Vol. viii. 318.

3. An attorney's bill, though not delivered, sufficient. *Ex parte Sutton*, Vol. xi. 163.

But a commission cannot be taken out on an equitable debt. *Ibid.*

4. Where the son, upon a settle-

ment made by his father upon his marriage, gave a bond of indemnity, held void, as a fraud upon the marriage contract. *Palmer v. Neave*, Vol. xi. 165.

5. Where the petitioning creditor's bond became assignable, and would have been ordered to stand as a security for costs, to be ascertained in an issue, and he afterwards became bankrupt, the Court ordered it to stand as a security for £30, as a liquidated sum. *Ex parte Rimene*, Vol. xiv. 600.

6. The assigning of the bond is conclusive evidence of the commission having been maliciously sued out, and neither more nor less than the penalty of the bond can be recovered: the Court, therefore, in a case of some suspicion of malicious motive, refused to assign, but superseded the commission with costs, without prejudice to any action. *Ex parte Lane*, Vol. xi. 415.

7. Where the bond is assigned, the whole penalty must be recovered. *Rimene, ex parte*, Vol. xiv. 600.

8. Whether judgment for damages, in an action for breach of promise of marriage, by relation to the time of the verdict, forms a debt, that will support a commission of bankruptcy, issuing, and the act of bankruptcy committed, in the interval, and as to the effect of the certificate upon such a debt, *Quære*.

The commission superseded; with the offer of a case. *Ex parte Charles*, Vol. xvi. 256.

An attorney, not having delivered his bill according to the statute Geo. 2. though he cannot bring an action, may be the petitioning creditor in a commission of bankruptcy: but his debt must be afterwards examined. *Ibid.* 166.

9. Ground of the general order, that the petitioning creditor shall attend in person at the opening a

commission of bankruptcy. *Ex parte Foster*, Vol. xvii. 415.

Useful, that the existence of the petitioning creditor's debt at the time of bankruptcy should appear on the deposition. *Ibid.* 415.

[E.] DOCKET, STRIKING THE.

1. Creditor by compromising his debt after having struck a docket forfeits the debt. *Ex parte Gedge*, Vol. iii. 349.

2. Where the fourth day is a holiday, a docket may be struck upon the first application the following day, though the office is shut; the commission may be obtained at the chambers of the clerk of the secretary of bankrupts. *Ex parte Cooper*, Vol. xii. 418.

3. General order as to the time of striking a docket on holidays, priority given; entering in the docket-book; inspection thereof; sealing and issuing commission. Vol. xiii. 207.

4. The object of Lord Erskine's order, 29 December, 1806, (Vol. xiii. 207,) to prevent dealing with a docket for the purpose, not of a commission, but of another arrangement; a practice to be discountenanced. *Bourne, ex parte*, Vol. xvi. 145.

A docket not to be struck without a solid ground of belief, that an act of bankruptcy has been committed. *Ibid.*

5. Practice of striking a docket for the purpose, not of a commission of bankruptcy, but of compelling a composition, disapproved and not aided. *Ex parte Masterman*, Vol. xviii. 298.

6. Application for a commission of bankruptcy on the evening of the fourth day from striking the docket, immediately before eight o'clock, the hour of shutting the office, sufficient within the general order,

29th December, 1806. *Nicholl's case*, Vol. xix. 616.

[F]. COMMISSION.

1. Commission of bankruptcy an action and execution in the first instance. *Ex parte Hamper*, Vol. xvii. 408.

2. *Quere*, Whether the order of Lord Apsley, dated the 12th of Feb. 1774, that a docket struck, and no commission issued thereon, shall in no case prevent a commission by another creditor upon an application not made in less than four days, can be strictly acted upon: the established practice in the office being at variance with it; and there being no danger of fraud. *Ex parte Leicester*, Vol. vi. 429.

3. Where a solicitor in London received directions from a client to strike a docket, and on the next morning, before the office opened, received similar instructions from another client, held that they must draw lots. *Haye's case*, Vol. xiii. 197.

4. Whether the striking a docket merely can be considered the issuing a commission within the statute 5 Geo. 2. c. 30. § 24. (a penal clause), *Quere*. *Ex parte Paxton*, Vol. xv. 462.

5. Petition to have a commission of bankruptcy of a date previous to the act of bankruptcy resealed, refused. *Ex parte Cheesewright*, Vol. xviii. 480.

Commission of bankruptcy resealed to correct a mistake in a name, if not opened. *Ibid.* 480.

6. Commission refused to be altered as to description of the bankrupt. *Ex parte Thompson*, Vol. ix. 207.

7. Commission cannot be resealed, even on the ground of a clerical mistake; if there has been any dealing upon it, as if it has been opened.

Fisher's case, Vol. x. 190; S. P. *Burrow's case*, Vol. x. 286.

8. Where a commission had been once opened and acted upon, but there was a failure of proof of the act of bankruptcy, except subsequent to the date of the commission, held that a new commission must be issued. *Ex parte Tkwaites*, Vol. xiii. 325.

9. A commission of bankruptcy cannot be sustained by residence abroad, where the departure from the realm is for a fair and proper purpose, and not with a view of defrauding creditors. *Ex parte Mutrie*, Vol. v. 576.

10. A joint commission against two partners in England, another partner residing abroad, superseded. *Ex parte Layton*, Vol. vi. 429.

11. Commission of bankruptcy against a distant country bank executed in London, on account of the holders of small notes in the country another commission was ordered to be executed there, for the purpose only of receiving proof of debts there; the proofs so taken to be received under the London commission. *Ex parte Upham*, Vol. xvii. 212.

12. Commission of bankruptcy, especially against country bankers, to be executed immediately, without waiting the time allowed by the general order of 1793. *Ex parte Mavor*, Vol. xix. 542.

13. General order, that in a country commission two barristers resident near the place be inserted in the list of commissioners; and no quorum commissioner, unless a barrister. Vol. v. 235.

14. Where two commissions are taken out against the same party, the Court will execute a discretion, controlling the strict right; and support that, which is most convenient; if the objections to it can be removed by superseding the other. *Ex parte Layton*, Vol. vi. 429.

Abuse of a commission by delaying the execution of it with a view to another arrangement. *Ibid.*

15. Though a bankrupt dies, not having surrendered, the commission may proceed. *Dewdney, ex parte*, Vol. xv. 494.

16. Commission established under strong circumstances of suspicion: particularly, that the affidavit and bond for the docket were written by the bankrupt; whose brother was the petitioning creditor. *Ex parte Steele*, Vol. xvi. 161.

17. Commission of bankruptcy relinquished by the petitioning creditor upon obtaining security, superseded; his proof under another commission expunged, and being an assignee, a new choice directed.

The knowledge of one or two individual creditors, if no general communication, does not prevent the effect of the stat. 5 Geo. 2. c. 30. § 24. *Ex parte Paxton*, Vol. xv. 461.

18. Discretion of the great seal to supersede a second commission against an uncertificated bankrupt, and even, under circumstances, on the petition of the bankrupt; or not.

The petition for that purpose of the petitioning creditor under the first commission dismissed with costs, under the circumstances; fifteen years since the first commission; during the last seven of which the bankrupt, who was his son-in-law, was permitted to carry on trade in another place. *Ex parte Lees*. Vol. xvi. 473.

Inconsistency of the decisions that a bankrupt, uncertificated, has no property, yet may acquire it by action. *Ibid.* 474.

Circumstances under which a bankrupt uncertificated might petition to supersede a second commission against him. *Ibid.*

As to the distinction, that an objection, which a third person may

take, cannot be taken by the bankrupt, *Quere*, with reference especially to criminal cases. *Ibid.* 476.

19. It is no objection to a commission that the direct object in taking it out is to prevent the execution of a creditor, provided it be the commission of the creditor and not of the bankrupt. *Ex parte Bowes*, Vol. xviii. 541.

20. Construction of the general order in bankruptcy (29 December, 1806), that the commission must be sealed at the first public seal after application within four days after the docket, though within less than seven days. *Ex parte Hyne*, Vol. xix. 61.

Commissioners of bankruptcy considered a court of justice for the purpose of protecting witnesses before them. *Ex parte Russell*, Vol. xix. 165.

The bankrupt statutes do not bind the crown. 165.

21. Order for a commission of bankruptcy against J. Stevenson, otherwise Stephenson, in an urgent case. *Stevenson's case*, Vol. xix. 277.

22. Commission of bankruptcy, for the mere purpose of giving a certificate, a conspiracy liable to indictment or information. *Ex parte Cawthorne*, Vol. xix. 260.

23. Insertion of bankruptcy in the Gazette suspended only where on inspection of the proceedings no bankruptcy found; or under a country commission to give the opportunity of producing the evidence.

Under the circumstances an issue directed to try the bankruptcy; which had not appeared in the Gazette; all proceedings under the commission being stayed. *Ex parte Tarleton*, Vol. xix. 464.

24. Any person, not a solicitor, may take out a commission of bankruptcy. *Ex parte Smith*, Vol. xix. 473.

25. On application to supersede a commission of bankruptcy, and issue another, the act of bankruptcy being subsequent to the date of the commission, the solicitor was required to state by affidavit, why he took out a commission which he could not support. Pending that, the time having expired, another creditor obtained a *supersedeas*, and a commission, under the apprehension of immediate extents. The bankruptcy was afterwards declared under the first commission, upon acts of bankruptcy found previous to its date; but the latter commission was preferred. *Ex parte Mavor*, Vol. XIX. 539.

Speculating commissions of bankruptcy, without the means of supporting them, disapproved. *Ibid.* 540.

26. Two commissions of bankruptcy for the same purpose cannot subsist together; in general the second will be superseded, but special circumstances, as consent, fraud, or laches, in the creditors under the first, will support the second and supersede the first; and if it happens that the bankrupt is encouraged to trade pending a commission, and a second one is sued out, the first will be instantly superseded upon the assignees paying the creditors under the first 20s. in the pound, and all the costs. *Ex parte Brown*, Vol. II. 67.

A commission differs from an execution, in vesting all the rights and possibilities of the bankrupt in the assignees, the latter passes only what is actually seized. *Ibid.* 68.

Joint and separate commissions are now blended together, and the practice of taking them out exploded as an unnecessary expense. *Ibid.*

Assignment under a second commission would be nonsuited in trover against assignees under the first. *Ibid.*

[G.] COMMISSIONERS.—POWERS.
—PRIVILEGES.

1. Commissioners are not to decide whether an estate shall be sold or not, there must be an order for sale, and any creditor may insist on it. *Ex parte Goring*, Vol. I. 169.

2. Upon bankruptcy the mode of selling an estate is left to the commissioners, and not directed by the Court, as in a sale by the Master. *Ex parte Comings*, Vol. I. 112.

3. Court cannot control the discretion of the commissioners as to signing a certificate. *Quære*, If a *mandamus* will lie? *Ex parte King*, Vol. XI. 417, 425.

Quære, If a signature, previous to the last examination, is such as the statute intended. *Ibid.* 424.

The mode of reviewing the opinion, whether the bankrupt's answers are satisfactory or not, is by *habeas corpus*. *Ibid.* 425.

4. Protection of commissioners of bankruptcy, granted at a private meeting on the application of the bankrupt the day after he was served with notice, and before the first public meeting, good. Order on the plaintiff in the action to discharge the bankrupt, and the officer to pay the costs. *Ex parte Wood*, Vol. XVIII. 1.

5. Court refused to interfere with the discretionary power of the commissioners, to enforce answers from a person examined as to the bankrupt's property, by ordering him to submit himself to be examined upon those points. *Ex parte Farr*, Vol. IX. 513.

6. The commissioners may, after deliberation, make their order of commitment when he is not present, and it is no objection that it bears date on the day of the examination, though in fact made some days after. *Salt's case*, Vol. XIII. 361.

Commissioners of bankruptcy

may be ordered to pay costs in respect of conduct out of the course of their duty as commissioners. *Salt's case*, Vol. xiii. 361.

7. Court can remove commissioners for misconduct, but will not make them pay costs. *Ex parte Scarth*, Vol. xiv. 204.

8. Costs to commissioners in bankruptcy, made parties to a petition without ground; viz. for refusing to admit the affidavit of an absent creditor, proceeding at law; not permitting the examination of the petitioning creditor by a person who had not proved a debt, and admitting the full proof of a creditor claiming a lien on papers in his hands, as agent in town for the bankrupt, as attorney. *Ex parte Steele*, Vol. xvi. 161.

9. Commitment by commissioners of bankruptcy for an unsatisfactory answer of the bankrupt illegal; the recital of the previous examination not correctly stating the admissions upon which the question was founded. Re-examination directed; the bankrupt being in custody also under a surrender by his bail. *Ex parte Hiams*, Vol. xviii. 237.

Whether a person committed by commissioners of bankruptcy can be discharged on petition without a *habeas corpus*, *Quære*. *Ibid.* 237.

10. A bankrupt may be committed by the commissioners, though swearing positively, if his answers are not reasonably satisfactory. Being brought up by *Habeas Corpus*, he was remanded; the whole examination not being satisfactory; though particular answers separately taken might have been so considered. *Taylor's case*, Vol. viii. 323.

11. Where bankrupt was committed for not giving satisfactory answers, the commitment being questionable, Court refused to in-

terfere by petition. *Ex parte Tomkinson*, Vol. x. 106.

12. The Court enforced its jurisdiction to compel a bankrupt, who had passed his examination and obtained his certificate, to attend the commissioners. *Anon.* Vol. xiv. 449.

13. So the Court will compel the attendance of witnesses, for the purpose of proving the various requisites to support the commission, though no express authority is given by the statutes. *Ibid.*

14. A witness refusing to attend the commissioners, to prove the act of bankruptcy, ordered to attend them. *Ex parte Jones*, Vol. xvii. 379.

15. In bankruptcy the Court has an implied authority under the statute, to order the attendance of any one to substantiate the proceeding, by proving the act of bankruptcy. Order made for solicitor, objecting, as having been the confidential agent, to attend, reserving just exceptions as to any questions that might be put by the commissioners. *Ex parte Higgins*, Vol. xi. 8.

16. Warrant of commissioners of bankrupt to arrest a witness may issue at once on disobedience to their summons; and does not require a second summons. *Linthwaite Ex parte*, Vol. xvi. 235 n.

17. When commitment by the commissioners for giving unsatisfactory answers is legal, Court cannot discharge him upon *Habeas Corpus*, on the ground that his farther examination can now be of no use to the creditors. *Quære*, If he can be committed for refusing to answer what would subject him to prosecution for felony? *Ex parte Nowlan*, Vol. xi. 511.

18. Commissioners of bankruptcy, as they cannot issue subpoenas, must upon questions of fact coming be-

fore them collaterally proceed by affidavit. *Ex parte Thistlewood*, Vol. XIX. 250.

19. Commitment of bankrupt on a question, whether he had communicated to his assignee according to the direction of the commissioners, where and how persons, named by him as debtors, were to be found, and if not, why not, answered, he had not, and could state no reason why, illegal; and the bankrupt discharged on *Habeas Corpus*: the commissioners having no power to delegate their authority to examine; and the bankrupt, no consent appearing on the warrant, not being bound to submit, or to state, why he did not; but, had they personally required the information from him, which he must be supposed capable of giving, his answer, that he would not, or could not, however direct, not being satisfactory, would justify commitment. *Cassedy's case*, Vol. XIX. 324.

20. If a person, committed by commissioners of bankruptcy, is entitled to be discharged only from a defect in form, the Court on *Habeas Corpus* required to commit. *Ibid.* 326.

21. A commissioner cannot purchase property under the commission for himself or another. *Ex parte Bennett*, Vol. x. 381.

22. The assignees, not the commissioners, are entitled to the custody of the proceedings. *Ex parte Scarth*, Vol. xv. 293.

[H.] ASSIGNMENT, EFFECT OF.

1. An assignment, by operation of the bankrupt laws, is not an assignment for valuable consideration, and in respect of the rights between husband and wife, its only effect is to place the assignees in the place and stead of the husband. *Wright v. Morley*, Vol. XI. 17.

2. They are entitled to the wife's equitable interest, as well as where she is entitled to a capital sum, subject only to the equity requiring some provision for her out of that interest. *Ibid.* 21.

Quere, If the equitable interests of the wife can be barred or affected by the husband's assignment for a valuable consideration. *Ibid.* 20.

3. The general assignment has not the effect of reducing into possession equitable interests of the bankrupt's wife, as a legacy of stock, and decreed, therefore, against the assignee, to be paid to her by right of survivorship. *Mitford v. Mitford*, Vol. ix. 87.

4. A distinction has always been made between a particular assignment for valuable consideration and an assignment by operation of law. *Ibid.* 97.

The wife surviving is not bound by his voluntary assignment. *Ibid.* 99.

What interests survive to the wife in equity, in general, is determined by analogy to the rules of law. *Ibid.* 98.

5. An assignment passes the bankrupt's rights in the same plight and condition as he possessed them, and even when they take a complete legal title, they are yet subject to whatever equity the bankrupt was liable to. *Ibid.* 100.

6. The assignees are not considered purchasers for valuable consideration, in the proper sense of the words, a distinction has been constantly taken between them and a particular assignee for a specific consideration. *Ibid.* 100.

Quere, If a particular assignee be liable to make a provision for the wife out of her fortune? *Ibid.*

7. Preference of the assignment under a commission of bankruptcy, to an extent for general acceptances, not due at the bankruptcy.

Distinction upon acceptances for the money of the Crown specifically remitted.

8. Compensation, under the London Docks Act, to the proprietors of ancient privileged quays, passed under a commission of bankruptcy. *Crutwell v. Lye*, Vol. xvii. 343.

9. Annuity by will charged upon real estate for A. for life, payable to him only, upon his own receipt and no other, and to cease immediately on alienation, ceases by the bankruptcy, and bargain and sale of the estate of A. *Domett v. Bedford*, Vol. iii. 149.

10. A debt due to the Crown preferred to creditors under a bankruptcy; the sheriff being in possession under several extents; one of which, for part of the debt, was tested the day the provisional bargain and sale and assignment were executed; the others having issued subsequently. *Rogers v. Mackenzie*, Vol. iv. 752.

11. Property attached in Jersey, being by the laws of that island vested in the creditor attaching upon confirmation by the court of the island, in the case of a bankruptcy it was held, that the creditors attaching were entitled to hold the property attached, and to prove for the residue, where the act of bankruptcy was subsequent to the completion of the judicial act, whether on the same or other day; but where the act of bankruptcy was previous, they could not hold against the assignees. *Ex parte D'Obree*, Vol. viii. 82.

12. Under an agreement to pay bills indorsed into a country bank on discount for the notes of the bank bills, paid in after the bankruptcy of some partners, but before that of the whole firm, cannot be retained by the assignees. *Ex parte McGae*, Vol. xix. 607.

13. Legacy, falling to a bank-

rupt before allowance of his certificate by the testator's death pending an unfounded petition to stay it, goes to his assignees; unless the petition was presented with that object. *Ex parte Ansell*, Vol. xix. 208.

[I.] ASSIGNEES—CHOICE—REMOVAL—POWERS—DUTIES, &c.

1. Order under statute fifth Geo. 2. c. 30, § 31, that new assignees may be chosen, and that the commissioners may execute a new bargain and sale and assignment, the former being vacated; all the assignees being dead; and the heir at law of the survivor being an infant. *Ex parte Bainbridge*, Vol. vi. 451.

2. Choice of assignees not disturbed on the ground that some creditors, whose votes would have turned the scale, were absent by accident; but otherwise, if kept back by fraud. An assignee will not be removed, merely because he must account, unless there is something in the nature of his interest rendering it impossible to take the account with due impartiality, or a degree of misconduct making him unfit to execute such a trust. *Ex parte Surtees*, Vol. xii. 10.

3. Assignees have all the equity the creditors have, and may impeach transactions which the bankrupt could not. *Anderson v. Maltby*, Vol. ii. 255.

4. A bankrupt, who had obtained his certificate, being possessed of leasehold premises as executor and residuary legatee, mortgaged them to secure a debt of his own; and afterwards assigned the equity of redemption for valuable consideration; the deed reciting, that the assignment was made for the purpose of paying the debts of the testatrix. The assignee took an assignment of the mortgage. The certificate being in an action held

to have been fraudulently obtained, the lease was claimed by the assignees under the bankruptcy: but it was determined, they had no right against the assignee for valuable consideration. *Bedford v. Woodham*, Vol. IV. 40. n.

5. The right to sue for money lost at play, given by 9th Anne, c. 14, to the loser is a vested interest, and upon his bankruptcy passes to the assignees. *Brandon v. Sands*, Vol. II. 514.

6. Assignees of a bankrupt recovered, in an action against the Bank, stock standing in the name of the wife. *Pringle v. Hodgson*, Vol. III. 620.

7. A specialty creditor has the same right under the bankruptcy of the heir of the debtor, as if he had not become bankrupt; and may therefore follow the real assets, or their specific produce, in the hands of the assignees. The subject being small, relief was given on petition. *Ex parte Moreton*, Vol. V. 449.

8. Assignees have no power beyond the purposes of their trust; and cannot, therefore, enter into an agreement disposing of the surplus after paying ten shillings in the pound to the creditors. The Court dismissed a petition claiming under such an agreement, without prejudice to a bill. *Ex parte Barfit*, Vol. XII. 15.

9. When assignees agree to sell, they agree to sell with a good title in special cases as when they enter into the contract, supposing they have a good title; the Court would stand neuter, and leave the parties to law. *White v. Foljambe*, Vol. XI. 343, 345.

10. Assignees advertising in the common way are bound, as much as other persons, to make a proper title; they may qualify, to sell only such title as they have. *McDonald v. Hanson*, Vol. XII. 277.

11. Sale by assignees under a bankruptcy by auction to one of the creditors, previously consulted as to the mode of the sale, and contrary to an order, that a receiver should be appointed to sell: another sale was directed; the estate to be put up at the aggregate amount of the purchase-money and the sum laid out in substantial improvements and repairs; which were to be allowed in case of a sale at an advance; but if no farther bidding, the purchaser to be held to his purchase. *Ex parte Hughes*, Vol. VI. 617.

12. Assignee of a bankrupt instead of selling the estate taking a lease himself, is answerable for profit or loss. *Ex parte Hughes*, Vol. VI. *Ibid.*

13. Assignee of a bankrupt not justified in deferring a sale; and in such case, if called upon to sell, will incur the peril of answering any depreciation. *Ibid.* Vol. VI. 622.

14. Order made to remove assignees, and vacate the bargain and sale to, without prejudice to purchasers. *Ex parte Leman*, Vol. XIII. 271.

15. An assignee, resident in Scotland, removed. *Ex parte Grey*, Vol. XIII. 294.

16. Assignee removed, and charged with interest at five per cent (before statute forty-ninth Geo. 3, c. 121, § 4.) for money paid in at his banker's to his account, and as his own property. *Ex parte Townshend*, Vol. XV. 470.

17. Assignees made no dividend, but, after thirteen years, had accumulated enough to pay fifteen shillings in the pound: sale and distribution ordered on petition of one creditor. *Ex parte Goring*, Vol. I. 168.

Assignees must not keep money in their hands. *Ibid.*

18. Assignee in bankruptcy charged with interest, not as partner in the

bank, into which the money was paid by direction of the creditors, but for keeping it there too long *Ex parte Baker*, Vol. xviii. 245.

19. Assignees kept the fund eight years without dividing; one admitted, he had lent the share received by him at five per cent: the other, that he had lent his share to a partnership, in which he was engaged, with his own money, without any distinct charge of interest: decreed to pay such interest as shall appear to have been made; and where none, four per cent. *Hankey v. Garret*, Vol. i. 236.

20. The actual interest at four per cent decreed against assignees for not making a dividend, may be increased under circumstances. *In re Hilliard*, Vol. i. 89.

If it be necessary for a man to keep money at his banker's, and he makes use of his constituent's money for that purpose, it is making advantage of it. *Ibid.*

21. Assignees held liable to reimburse messenger his expenses subsequent to their appointment, although the commission was superseded for fraud, the petitioning creditor not to be found, and they not privy to such fraud, nor received any effects. *Ex parte Hartop*, Vol. ix. 109.

22. Assignees of a bankrupt removed, on the ground that one of them had purchased the bankrupt's estates, under the commission, for himself. A resale was directed; and the purchaser to account for a profit gained by him upon a resale of part: but he was discharged from the purchase only conditionally, in case the resale should produce more. *Ex parte Reynolds*, Vol. v. 707.

23. As to a purchase by a trustee of the trust-property, the rule is, that it shall not prevail under any circumstances, unless the connexion appears satisfactorily to have been dissolved, a transaction to be viewed

with great jealousy, from the opportunity of acquiring knowledge as trustee, or by universal consent. But as against him it shall stand, as if more cannot be obtained. The rule applies to all agents, and most strictly to assignees in bankruptcy from their great power. In this instance, that of an assignee, another sale was directed: the premises to be put up at the price he gave; and if no more bid, his purchase to stand. As he had bought them in at a former sale at a higher price, when there was another bidder to a greater amount than the final purchase, *Quære*, how the assignee is to be charged as to that difference. *Ex parte Lacey*, Vol. vi. 625.

24. Assignee of a bankrupt purchasing dividends is a trustee for the creditors or bankrupt according to the circumstances. *Ex parte Lacey*, Vol. vi. *Ibid.*

25. A banker receiving the money under a bankruptcy ought not to be an assignee. *Ex parte Lacey. Ibid.*

26. Assignee under a commission of bankruptcy cannot maintain a petition against a person not claiming under the commission. *Ex parte Pease*, Vol. xix. 46.

27. Order on a provisional assignee to deliver up short bills, leaving a sufficient amount to answer acceptances on account of the petitioners, and indemnifying the estate against any possible loss upon them; an extent being otherwise satisfied. *Ex parte Buchanan*, Vol. xix. 201.

And see *supr.* [G.] 22.

[K.] PROOF.

And see MORTGAGE—EQUITABLE, 1.

1. Two commissions of bankruptcy having issued, and one being superseded, proofs under that ordered to be received under the other. *Ex parte Upham*, Vol. xvii. 212.

2. Auxiliary commission of bank-

ruptcy to receive proof of debts in the country, limited to notes under twenty pounds; and liberty to examine the bankrupts under it refused. *Ibid.* 213.

3. Where there was a solvent partner, and no joint property, a joint-creditor not permitted to prove under the separate commission with the separate creditor, without resorting to the solvent partner. *Kennington Taylor, ex parte*, Vol. xiv. 447.

4. Petitioners having proved under a joint-commission, upon a joint and several bond, permitted to waive such proof, and prove under against the separate estates, not disturbing dividends already made. *Ex parte Beilby*, Vol. xiii. 70.

5. Proof under the bankruptcy of one joint debtor, after receiving a composition from the other, expunged: the release to one being a release to both. *Ex parte Slater*, Vol. vi. 146.

6. Where partners carry on individually distinct trades, the joint-firm may prove against the separate estate. By the Chancellor. *Ex parte St. Burke*, Vol. xi. 413.

7. Proof under a commission of bankruptcy against an overseer of the poor, in respect of money in his hands at the time of his bankruptcy before the period of accounting. *Ex parte Esleigh*, Vol. vi. 811.

8. The Bank of England not entitled to prove under a commission of bankruptcy by a clerk, without a power of attorney. A general order to enable them proposed. *Ex parte the Bank of England*, Vol. xviii. 298.

9. Though unliquidated damages cannot be proved under a commission of bankruptcy, yet, if the demand is partly of that nature, and partly liquidated, as the difference of price upon a resale, the creditor having a security may apply it first

to the former, then to the latter, and may prove the residue. *Ex parte Hunter*, Vol. vi. 94.

10. A debt, which could not be recovered in an action against a plea of the statute of limitations, nor in equity by analogy to it, not admitted under a commission of bankruptcy. *Ex parte Dewdney*, Vol. xv. 479.

11. Order (*Ex parte Dewdney, ante*, Vol. xv. 479.) giving effect to the statute of limitations in bankruptcy, affirmed on hearing. *Ex parte Roffey*, Vol. xix. 468.

12. Under a guaranty the debt is contingent only: therefore a debt, accrued by default after the bankruptcy of the surety, cannot be proved under the commission. *Ex parte Gardom*, Vol. xv. 286.

13. A creditor, who has not received dividends under a composition, if a bankruptcy takes place, and there is no fund separated for his use, cannot have those dividends out of the bankrupt estate and prove the residue of his debt, but must come in as the other creditors, at the date of the bankruptcy. *Oliviera, ex parte*, Vol. viii. 84.

14. Where petitioner refused to answer how he disposed of money paid to him, on the ground that it might criminate him, only alleging that he had received no part on account of his own demand; held that being *prima facie* accountable for the receipt of such money, the creditors had a right to insist that he shall discharge himself; commissioners having therefore refused his proof, Court also dismissed his petition. *Ex parte Symes*, Vol. xi. 521.

15. Accommodation bills, upon the bankruptcy of the drawer, were fully paid by the acceptors to the holder; who, having a farther demand, under the commission proved for the whole, including the bills: he may take out of the dividend

upon the bills the proportion he would have received upon the residue of his debt beyond the bills, if the debt for the bills had been expunged: the rest of the dividend on the bills belongs to the acceptor. *Ex parte Turner*, Vol. III. 243.

16. Acceptor becoming bankrupt, the petitioner having indorsed before the bankruptcy, took up the bill: he may prove; but cannot set off a debt due from him to the estate. *Ex parte Hale*, Vol. III. 304.

17. A person giving cash for a bill without the indorsement of the person from whom he takes it, cannot prove it under his bankruptcy. *Ex parte Shuttleworth*, Vol. III. 368.

18. Cross paper between two houses; both of which become bankrupt: as between the two estates no proof can be made in respect of the bad paper; or the excess of damage eventually sustained on that account. *Ex parte Walker*, Vol. IV. 373.

19. *A.* to discharge a debt due from him to *B.*, procures his banker *C.* to direct his correspondent and partner *D.* to accept a bill drawn by *B.* Before the bill was due, *C.* and *D.* became bankrupt; *C.* being indebted to *A.* more than the amount of the bill. *B.* proved against the estate of *D.*; but afterwards received the whole from *A.* *A.* not having proved against the estate of *C.* in respect of the bill is entitled to stand in the place of *B.* against the estate of *D.*; whose proof having been expunged, was reinstated for the benefit of *A.* *Ex parte Matthews*, Vol. VI. 285.

20. Dividends declared upon a bill of exchange, though not received, must be deducted from the proof by the indorsee under another commission of bankruptcy. *Ex parte Leers*, Vol. VI. 644.

21. The holder of a bill of ex-

change may be compelled to prove under the bankruptcy of the acceptor for the benefit of the drawer. *Wright v. Simpson*, Vol. VI. 734.

22. Proof allowed under a commission of bankruptcy in respect of a bill alleged to be lost, but the most extensive indemnity to be given; and to be settled by the commissioners. *Ex parte Greenway*, Vol. VI. 812.

23. A bill indorsed by the drawer as a farther security on discounting another bill for him; the drawer and acceptor of the bill so indorsed becoming bankrupts, the proof against the estate of the acceptor, not the dividend only, was restrained to the original debt. *Ex parte Bloxham*, Vol. V. 448.

This point being brought on afterwards before Lord Eldon Chancellor, this decision was over-ruled. *Ex parte Bloxham*, Vol. VI. 449. 600.

24. Acceptor for the honour of the drawer of a bill originally accepted by the bankrupts, having taken up the bill, ought, if the bankrupts had no effects in their hands, to resort first to the drawer. Therefore, though his proof was permitted to stand, the dividend was restrained for an inquiry, whether the bankrupts had effects, and if not, whether the person, who so took up the bill, had effects of the drawer at the time or since. *Ex parte Wackerbath*, Vol. V. 574.

25. Cross paper, dishonoured on each side; both parties being bankrupt: as between the two estates the proof was confined to the cash balance, without regard to the dishonoured bills. *Ex parte Earle*, Vol. V. 853.

26. Proofs in bankruptcy expunged, and certificate recalled, being obtained by fraud. *Ex parte Carwithorne*, Vol. XIX. 260.

27. Bankers, appointed under a commission of bankruptcy, be-

coming bankrupt, their estate cannot have any dividend on a debt previously due to them, until the whole, received by them as bankers to that estate, has been accounted for. *Ex parte Bebb*, Vol. XIX. 222.

28. Acceptances by bankers, and bills remitted to them in the course of a banking account with the bankrupt. Their acceptances not due at the bankruptcy are a good consideration; and taking them up they may prove upon the bills in their hands, though not due at the bankruptcy. The proof must be upon the bills, and not as a cash balance. *Ex parte Bloxham*, Vol. VIII. 531.

29. *A.* and *B.* having dealings and cash accounts together, and both become bankrupts, proof of a balance due to *B.* allowed; but dividends retained to answer outstanding bills from *A.* to *B.*, some of which were dishonoured. *Ex parte Metcalfe*, Vol. XI. 404.

30. Where the debt arose upon notes, the consideration for which was made up, partly of the fruit of illegal transactions in stock jobbing, and part of monies received, proof allowed as to the latter, but not of the former. *Ex parte Bulmer*, Vol. XIII. 313.

31. Where goods were sold, to be paid by bill at three months, and before that period the drawer and acceptor of the bill, and the vendee, became bankrupt; vendor proved and received dividends under the commissions of the drawer and acceptor, and offered to prove under that of the vendee, who had not indorsed the bill, and held that he was entitled so to do; but the claim and dividends were ordered to be reserved until the deficiency was ascertained. *Ex parte Blackburne*, Vol. X. 204.

32. Where there is an antecedent

debt, and a bill is taken without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to. *Ibid.*

33. Where the terms are so extremely inadequate, as to satisfy the conscience of the Court that there must have been imposition or oppression, this Court will order the instrument to be delivered up. So annuity deeds void under the act; but parties were allowed to have the validity of objections tried at law. *Underhill v. Horwood*, Vol. X. 209.

And decree affirmed upon a rehearing. Vol. XIV. 28.

34. Proof in bankruptcy upon promissory notes for liquidated damages by compromise of an action for seduction; *per quod servitium amisit*. Vol. XV. 286.

35. Acceptor without effects for the accommodation of the drawer, being compelled, on his bankruptcy, to pay the bill (before the statute 49 Geo. 3. c. 121.), obtained judgment in an action for the amount, with interest and costs. The assignee of that judgment was admitted, under the act which passed in the interval, to prove the original debt, not disturbing any dividends already made, the judgment being considered as a security for the original debt; which may be proved, and would be barred by the certificate. *Ex parte Lloyd*, Vol. XVII. 245.

36. Bills drawn and accepted by the same persons, as constituting distinct firms, proof against the acceptor, without deducting the value of a security from the drawer. *Ex parte Parr*, Vol. XVIII. 65.

37. Consignment with authority to sell to reimburse advances on the consignment; any deficiency to be made good, and the surplus, if any,

restored. Part of the goods being sold to the consigners, proof under their bankruptcy was limited to the balance of the original advance.

Ex parte Thomson, Vol. xviii. 234.

38. Where a party assigned all his book debts to his creditors, and covenanted, that if their respective debts were not satisfied at the expiration of two years, then to pay them the deficiency within one month; and the creditors, in consideration thereof, covenanted not to sue, &c. The party became bankrupt before the two years expired, the creditors having received 10s. in the pound, held that they were entitled to prove for the residue of their debts under the commission, subject to a debate in respect of the period when the full payment was to have been made. *Ex parte Richardson*, Vol. xiv. 184.

39. *Quere*, As to such assignment of debts being an act of bankruptcy?

40. Upon an undertaking to pay the debt of another on one month's notice in writing, and no notice was given before the bankruptcy of the principal, held that it was a contingent debt, and could not be proved. *Ex parte Minet*, Vol. xiv. 189.

41. Where the debt arose by payments made on account of the bankrupt in settling a balance of account on stock jobbing transactions, the Court, doubting if any right of action could arise out of such transactions, directed it to be put in a course for the decision of a court of law. *Ex parte Daniels*, Vol. xiv. 191.

42. Proof in bankruptcy upon a bill reduced by the previous part payment or declaration of dividend from the estate of another party; unless in a special case; as where it was pending a petition against the rejection of the proof for the whole amount; which decision of the com-

missioners was overruled. *Ex parte the Bank of Scotland*, Vol. xix. 310.

43. Proviso in a deed of composition, that in case of default of payment, or if a commission of bankruptcy should issue, the covenants to accept the composition should be void, and the creditors be paid, or prove their whole debts, deducting only what had been received. Upon bankruptcy after breach, and a subsequent part payment, the creditors were held entitled to prove the whole residue of their debts, according to the proviso, retaining what they had received. *Ex parte Vere*, Vol. xix.

44. Debt absolute by the happening of the contingency before bankruptcy, proveable. *Higginbotham v. Holmes*, Vol. xix. 93.

45. A sole trader, indebted by bond, took in a nominal partner, but without fraud; two years after, the partnership failed; the separate debt not permitted to be proved under the joint commission, unless something, as payment of interest by both, to make the partnership liable, but very little would be sufficient. *Ex parte Jackson*, Vol. i. 131.

46. Bond debt payable on the death of two obligors, or the survivor, cannot be proved. *Ex parte Barker*, Vol. ix. 110.

47. Upon a bankruptcy, proof of debt under bonds securing an annuity was rejected, on the ground that a bill accepted for the arrear, not being dishonoured till after the bankruptcy, the bonds were not forfeited at the bankruptcy. The bonds being void under the annuity act, there being no enrolment of one, and the consideration of the other not being truly stated, petition to be admitted a creditor for the sums advanced was dismissed on the ground, that the petitioner having insisted on his securities at

the date of the commission, it was not the same debt. *Ex parte James*, Vol. v. 708.

48. Bond upon a loan of stock, to secure a re-transfer and the dividends in the mean time. The obligor becoming a bankrupt after the day mentioned in the condition, proof was admitted for the amount of the dividends due before the bankruptcy, and the value of the stock at the date of the commission, by analogy to the case of annuities. *Ex parte Day*, Vol. vii. 301.

49. No proof under a bond to replace stock and pay the dividends, unless forfeited, either as to the capital or dividend, before the bankruptcy. *Ex parte King*, Vol. viii. 334.

50. On articles amounting to a covenant by the husband, that he would, upon his marriage, pay a sum which would produce, in dividend, 40*l.* per annum; upon his bankruptcy, the wife and children allowed to prove 800*l.* *Ex parte Granger*, Vol. x. 349.

Upon a bond and covenant to secure an annuity, although bond is barred by the certificate, yet party may proceed upon the covenant for subsequent breaches, which could not be proved.

51. Proof in bankruptcy under a covenant by the bankrupt in consideration of marriage immediately after the marriage, or whenever afterwards requested by the trustees, to transfer 2000*l.* stock, alleged to be standing in his name; though not the fact: but the specific time of the request must be ascertained. *Ex parte Campbell*, Vol. xvi. 244.

52. Trustee of a wife's property settled to the use of the husband for life, so long as he should be solvent; and in case of bankruptcy, to the separate use of the wife, with power to lend the money to him,

and which was accordingly advanced to him upon bond; permitted to prove under his commission. *Hinton, ex parte*, Vol. xiv. 599.

53. Covenant within seven years, or when requested, to convey lands of a given value in particular counties. Under a bankruptcy, after the expiration of the seven years, and no request made, proof not admitted upon the covenant, unless secured by a penalty. *Ex parte Mare*, Vol. viii. 335.

54. Agreement to replace stock upon demand. If demand is made before the bankruptcy, the price may be proved. *Ibid.* Vol. viii. 337.

55. Upon verdict, judgment, and taxation of costs, in an action to recover for a loss upon resale of goods, for which, by agreement, defendant was to be liable, after the bankruptcy; held that the costs could not be proved under the commission. *Quare*, As to the case of bankruptcy between verdict or nonsuit and judgment? and as to the effect of the certificate in such cases? *Ex parte Hill*, Vol. xi. 646.

There are cases in which costs of suit, as having relation to the original debt, are discharged by the certificate, but which cannot be proved under the commission. *Ibid.* 649.

56. Judgment in an action against a bankrupt not followed by execution, the bankrupt having surrendered in discharge of his bail: not an election to proceed at law, preventing the plaintiff going in under the commission. *Ex parte Arundel*, Vol. xviii. 231.

57. Where joint and several bonds are given, and afterwards another several security from each; *quare*, if there may not be proof, though

not to take dividends from both estates. *Ex parte Bevan*, Vol. ix. 225.

58. Where a surety to an indemnity bond distinctly limited the extent to which he was to be answerable, and he had paid the amount; held, that his equity to receive the dividends, upon proof made by the creditor under the bankruptcy of the principal debtor in respect of such bond, was not defeated by credit having been given beyond the stipulated sum. *Paley v. Field*, Vol. xii. 435.

59. Bond of indemnity to a surety for payment of instalments, the first of which was not due till after the bankruptcy of the principal, cannot be proved, though payable before the bankruptcy. *Ex parte Walker*, Vol. iv. 385.

60. Where a surety entered into a bond under a certain penalty, with a condition for payment of bills, notes, &c. to other persons of unlimited amount, but the extent of the demand against the principal limited to the amount of penalty; held, that paying that sum, he was entitled to a proportion of the dividends received by his principal, a creditor under the bankruptcy to a larger amount. *Ex parte Rushforth*, Vol. x. 409.

61. A surety in a bond may compel the principal creditor to go in and prove the bond under the commission: and if the surety pays the whole, the creditor will be a trustee of the dividends for him. But between several parties, whose names are on a bill, &c. and equities among them that one should pay first for the benefit of the other, if nothing is paid before proof made by the holder, the rest cannot raise that equity by payment subsequent to the proof of the holder, until he has received 20s. in the pound. *Ibid.* 414.

62. A party having a demand upon a bill or bond against several, and nothing paid before the bankruptcy of any of them, he may prove against each, whether principals or sureties, until he has received in full. *Ibid.* 416.

63. Where a man, engaged for the whole of a debt, pays only a part, he has no equity to stand in the place of the person paid. *Ibid.* 420.

64. Ground upon which the proof, in the case of mortgages of real or personal estate, is reduced in the first instance is, that the creditor has got part of the bankrupt's estate. *Quære*, As to the effect of indorsing bills, &c. deposited as securities? *Semble*—if it were accommodation paper proof would not be expunged, the party paying it being in truth a surety for the bankrupt, and would have a right to insist upon its being held for his benefit. *Ibid.* 418.

65. The value of an annuity to be proved in bankruptcy is not the stipulated price for redemption, nor the original price simply; but, in the absence of any peculiar circumstances, the original price, with the variation occasioned by the lapse of time since the grant. *Ex parte Whitehead*, Vol. xix. 557.

[L.] ELECTION OF CREDITORS.

1. Six months after the bankruptcy, a creditor who takes the bankrupt in execution petitioned for account, and to be admitted under the commission: account ordered, and the dividend to be reserved to the extent of the verdict. To elect within a fortnight. *Quære*, Whether a creditor may wait a reasonable time for a dividend, or must elect immediately? If he has taken his remedy at law, he cannot take a dividend too, but may assent or

dissent to the certificate. *Ex parte Hopkinson*, Vol. i. 159.

2. Creditor, three years and a half after receiving dividend, on refunding, permitted to proceed at law against bankrupt: so against bail put in after the commission was abandoned; not if surprised, as where, after bail put in, plaintiff submitted to the commission, on which account they neglected to surrender their principal, and he absconded. *Ex parte Wright*, Vol. ii. 9.

No costs on an application to put party to election. *Ibid.*

3. Though a creditor, having received a dividend under a bankruptcy, may refund and proceed at law, he cannot if he has signed the certificate. *Ex parte Freeman*, Vol. iv. 836.

4. A creditor taking the body of the bankrupt in execution, after a commission issued, is an election; and the Court will not look to the motive: by the body being taken the debt is satisfied: if the creditor have him in execution at the time the commission issues, the creditor not having contemplated an event which may deprive him of the fruit of his execution, has a right to elect. *Ex parte Knowell*, Vol. xiii. 192.

5. Where creditors arrested the bankrupt for part of their debt, and upon his becoming supersedeable, detaining him for the remainder, being also assignees; but when ordered to make a dividend, not proving, but only claiming to a much less amount than they had sworn to at law; held, that it was a clear case of election. *Ex parte Parquet*, Vol. xiv. 493.

6. Creditors having elected, may lay a ground for staying a certificate. *Ibid.* 495.

7. In bankruptcy a creditor by a

joint and several bond must elect, whether he will go against the joint or separate estate; but was not bound by taking a joint security. *Ex parte Hay*, Vol. xv. 4.

8. A creditor who has the debtor in execution is not put to election until a dividend, order was therefore made, to permit him to vote in the choice of assignees, without discharging the bankrupt. *Ex parte Sharpe*, Vol. xi. 203.

9. Although the rule is, that a creditor cannot be compelled to elect, to prove under the commission, or proceed at law, before a dividend; yet when a creditor had split his demand, with a view to have both remedies, and being the assignee, delayed a dividend, the Court ordered him to elect in a given time, unless upon inquiry it turned out that the demands were distinct. *Ex parte Grosvenor*, Vol. xiv. 587.

10. Bankrupt surrendered in discharge of his bail, and discharged by the creditor; having never been charged in execution: this is no election; and the creditor was admitted to prove. *Ex parte Cundall*, Vol. vi. 446.

[M.] SURRENDER.

1. Bankrupt was prevented from surrendering, because the Commissioners did not attend at the day: on petition of the Commissioners another day was appointed. The Court blamed their conduct, and said, the petition ought to have been by the bankrupt. *Ex parte Grey*, Vol. i. 195.

2. An order to enlarge the time for surrender can only be made upon application by the bankrupt upon an affidavit as to the circumstances that prevented his surrender, or by his assignees. *Fuller's case*, Vol. x. 183.

3. Effect of the Lord Chancellor's order permitting a bankrupt to surrender, after expiration of the time; not protecting him from a prosecution. *Jackson, ex parte*, Vol. xv. 119.

4. As to the jurisdiction to discharge a bankrupt, taken in execution, after the time for his surrender had expired, having obtained an order for a meeting to take his surrender. *Quære*.

The order of discharge, if made, must be upon the plaintiff at law, not the gaoler. *Anon.* Vol. xv. 1.

5. Effect of the Lord Chancellor's order, after expiration of the time for surrender of a bankrupt: authorising, not compelling, the Commissioners to take the examination; and showing the Chancellor's opinion, that it is not fit that he should be criminally prosecuted. *Anon. Ibid.*

6. Surrender permitted after the proper time had expired, under circumstances which prevented it. *Ex parte Higginson*, Vol. xii. 496.

[N.] CERTIFICATE.

And see *supra*, [L.] 6.

1. Certificate shall not be staid, in order to give a person insisting on a right to stop *in transitu* an opportunity of proving, in case he should fail in his action. *Ex parte Heath*, Vol. vi. 613.

2. General inspection of a bankrupt's books, for the purpose of getting rid of the certificate by proving gambling transactions, refused. *Ex parte Mawson*, Vol. vi. 614.

3. Joint certificate allowed as the separate certificate of the survivor. *Ex parte Currie*, Vol. x. 51.

4. The certificate is in the discretion of the Commissioners, and the Court cannot call upon them to certify their reasons for refusing to sign it. *Ex parte King*, Vol. xiii. 181.

5. Creditor having the bankrupt

in execution before the bankruptcy, petitioning to prove, for the purpose of preventing the certificate then pending, waiving all benefit of dividend, and that the certificate might be staid. Petition dismissed, as far as it sought to stay the certificate, with costs of the petition. *Ex parte Warwick*, Vol. xiv. 138.

6. Judicial discretion of Commissioners of Bankruptcy as to the certificate not subject to control. *Ex parte King*, Vol. xv. 126.

7. Bankrupt's certificate sent back for the purpose of letting in other creditors: the Commissioners not confined by that object: nor bound by the original certificate: but the whole is open to their judicial discretion: the original and supplemental act making but one certificate, of the latter date. *Ibid.*

8. General order as to bankrupts' certificates. Vol. xvi. 318.

9. Bankrupt's certificate, though would be void if obtained by money, even without his privity, was not staid on mere suspicion, not supported by affidavit, and denied by the bankrupt. *Ex parte Hall*, Vol. xvii. 62.

10. Bankrupt's certificate signed by the Commissioners, staid by the Lord Chancellor under circumstances appearing upon the examination, particularly the inconsistency of the statement that he had no written documents except a book produced, appearing to have been compiled from other written documents. *Ex parte Bangley*, Vol. xvii. 117.

11. Whether bankrupt's certificate can be sent back to the Commissioners to be reviewed upon the point, whether a full discovery has been made—*Quære. Ibid.*

12. Duty of Commissioners of Bankruptcy, particularly with reference to the certificate; having

also in a sense an independent judicial character. *Ibid.* 118.

13. Bankrupt's certificate not requiring a stamp until complete by allowance; an objection, from alterations after it had been stamped before allowance, overruled. *Ex parte Sawyer*, Vol. xvii. 244.

14. Petition to stay a bankrupt's certificate upon allegation of concealment, sworn to only upon information and belief, dismissed with costs. *Ex parte Joseph*, Vol. xviii. 340.

15. Effect of Stat. 49 Geo. III. c. cxxi. s. 14: a creditor coming in under a commission of bankruptcy for the purpose of relief waives his personal remedy. *Ibid.* 341.

16. Distinction as to signing bankrupt's certificate, depending on the caprice of the creditors; but if no wilful concealment, the Commissioners are bound to sign, and the Lord Chancellor to allow, without regard to conduct previous to the bankruptcy. *Ibid.* 342.

17. Signature of one trustee to a bankrupt's certificate without authority to act for the other, not sufficient. *Ex parte Rigby*, Vol. xix. 463.

[O.] SUPERSEDEAS.

1. Creditor, upon receiving his debt, superseded the commission without application to the Court: ordered to refund. *Ex parte Thompson*, Vol. i. 157.

2. Bankruptcy superseded: all the creditors being paid and consenting except two, who could not be found; but their securities were delivered up with receipts upon them, and their signatures proved. *Ex parte King*, Vol. ii. 40.

3. Commissions of bankrupt to be executed in London shall be supersedeable for want of prosecution at the end of fourteen days; and

those not in London, at the end of twenty-eight days from the date; and one day more shall elapse before the order of the supersedeas; and the application first made in that day by any other attorney for a supersedeas and new commission shall be preferred to that of the attorney who sued out the former. *Gen. Ord.* Vol. ii. 190.

4. The bond upon suing out a commission of bankruptcy must be by the petitioning creditor: the commission therefore was superseded on account of his infancy. *Ex parte Barrow*, Vol. iii. 554.

5. Commission of bankruptcy superseded on the grounds, that the act of bankruptcy was near eleven years before, and perfectly notorious; and that it was founded upon the debt of a creditor, who must of necessity gain the whole direction; and the debt being matter of account disputed by the bankrupt in an action, in which he swore to a debt due to him, and by filing a bill in equity. *Ex parte Bowes*, Vol. iv. 168.

6. A commission of bankruptcy supersedeable under Lord Loughborough's order, dated the 26th of June, 1793, is not actually superseded till the writ of supersedeas issues; and therefore having been opened, and the bankruptcy adjudged, after the order made for the supersedeas, but before the writ sealed, notice of the application having been according to the practice in the office sent to the solicitor, the commission was supported. *Ex parte Leicester*, Vol. vi. 429.

7. An order for a supersedeas has no effect till the writ issues. *Ex parte Layton*, Vol. vi. 434.

8. Adjudication of bankruptcy on Saturday too late for the Gazette. On Monday, another solicitor having notice, obtained a supersedeas un-

der the general order, 26th June, 1793; both the bankruptcy and the supersedeas appeared in the Gazette on Tuesday. The supersedeas was quashed: and a procedendo issued. *Ex parte Ellis*, Vol. vii. 185.

9. Petition to supersede a commission of bankrupt, before any meeting, upon affidavits of the solvency of the bankrupt, that he never committed an act of bankruptcy, and did not owe the petitioning creditor 100*l.* refused; nor would the Lord Chancellor direct an issue. *Ex parte Stokes*, Vol. vii. 405.

10. A bankrupt, who has neglected to surrender, cannot supersede his commission with the consent of his creditors without first obtaining leave to surrender. *Ex parte Jones*, Vol. viii. 328.

11. Though 20*s.* in the pound have been paid under a commission of bankruptcy, and the certificate obtained, the commission cannot be superseded, without consent of the creditors, upon the circumstance, that some are abroad, and not to be found. *Ex parte Jackson*, Vol. viii. 533.

12. Commission, though obtained by fraud, not superseded, when there are purchasers under it. *Ex parte Edwards*, Vol. x. 104.

13. Commission not to be superseded before surrender. *Ex parte Jones*, Vol. xi. 405.

14. Commission superseded for fraud and oppression; bankrupt must be completely indemnified; Court refused to charge the attorney, he having expressly denied the charges against him. When the effect is a mere private wrong to the client, not such an abuse as amounts to a contempt, the client must bring his action. *Ex parte Heywood*, Vol. xiii. 67.

15. The Court refused to super-

sede a commission, where certificate had been obtained after a delay of five years, and the party consulant of all the objections. *Moule, ex parte*, Vol. xiv. 602.

16. Upon superseding a fraudulent commission, the solicitor charged with the costs of the proceedings under the commission, with the other parties, but not with the costs of the prosecution instituted for criminally conspiring to defraud the creditor, the solicitor not being a defendant in that indictment, and it having been instituted by the creditor without any application to the Court. *Ex parte Arrowsmith*, Vol. xiv. 209.

A commission may be legally sued out, for the express purpose of defeating an execution, if the party be really under circumstances in which a commission may issue against him. *Ibid.*

17. A bankrupt cannot supersede his commission by impeaching the petitioning creditor's debt, on the ground of a security taken privately; the remedy under the stat. 5 G. III. c. 30, s. 24, being given to some other creditor. *Ex parte Kirk*, Vol. xv. 464.

18. Commission of bankruptcy after a considerable acquiescence by the bankrupt, not superseded without a trial at law. *Kirk, ex parte*, Vol. xv. 464.

19. Distinction between the application of a creditor and that of the bankrupt, to supersede the commission upon a prior act of bankruptcy, &c. whether that is competent to the bankrupt, *Quære. Ibid.* 468.

20. Though a second commission against a bankrupt, uncertificated under a former commission, is bad in law, whether the Lord Chancellor will, at the instance of the bankrupt, supersede the latter, if the as-

signees under the former will not interfere with the property, *Quære. Ex parte Rhodes*, Vol. xv. 539.

21. Bankrupt, praying to supersede his commission on the ground of infancy, left to his action, having traded two years as an adult; and the creditors resisting. *Ex parte Watson*, Vol. xvi. 265.

22. Commission of bankruptcy may be superseded at any time after the first meeting, upon consent of all the creditors who had proved. *Ex parte Duckworth*, Vol. xvi. 416.

23. Bankrupt cannot supersede his commission with consent of all the creditors, while under commitment by the Commissioners. *Ex parte Bean*, Vol. xvii. 47.

24. Bankrupt cannot supersede his commission before surrender. *Ibid.* 48.

25. Advertisement of bankruptcy in the Gazette suspended, but only on the ground that there was not a sufficient act of bankruptcy on the proceedings; viz. a denial to a creditor, with subsequent approbation; but the time not ascertained, nor connected with the previous direction, ten months before the commission; a farther affidavit was required, upon which the commission was superseded. *Ex parte Foster*, Vol. xvii. 414.

26. Commission of bankruptcy superseded to defeat a prosecution for omitting to surrender under circumstances of erroneous advice; no fraud; and another commission issued proceeding. *Ex parte Laverder*, Vol. xviii. 18.

27. Bankrupt under commitment, may petition to supersede the commission. *Ex parte M'Gennis*, Vol. xviii. 289.

28. Commission of bankruptcy superseded, and an action brought;

the Lord Chancellor ordered the commission and proceedings to be delivered by the solicitor to the secretary, and by him to the associate, to be produced on the trial; with liberty to inspect and copy.

Such an order properly refused by a judge. *Ex parte Warren*, Vol. xix. 162.

29. Commission of bankruptcy not superseded without consent of all the creditors, who had proved, certified by the Commissioners, and affidavit of the bankrupt's confirmation of all purchases under the commission. Consent of creditors, who had received twenty shillings in the pound, not dispensed with. *Ex parte Milner*, Vol. xix. 202.

30. Discretionary power of superseding a commission of bankruptcy. *Ex parte Hodgkinson*, Vol. xix. 291.

[P.] IN CASE OF PARTNERS.

1. Creditors of a partnership, which failed in two years, allowed to come upon the separate estate of one partner, in respect of effects taken out of the partnership by him without the privity of the other. *Ex parte Lodge*, Vol. i. 166.

2. A partnership of three becoming insolvent, and one being an infant, a joint commission of bankruptcy against the other two was superseded. *Ex parte Henderson*, Vol. iv. 163.

3. Separate creditors having received 20s. in the pound, are not entitled to interest out of the surplus of the separate estate, until the joint creditors are paid 20s. in the pound. *Ex parte Clarke*, Vol. iv. 677.

4. Money paid by one partner in a joint concern, being his liquidated share of the joint debts, to another partner, as agent for settling the

debts, if not applied accordingly, may be proved as a debt upon the bankruptcy of the latter; and therefore a payment by the other on the same account after the bankruptcy cannot be recovered from the bankrupt, who had obtained his certificate: but in respect of another payment, also after the bankruptcy, in consequence of the failure of the bankrupt and other partners in paying their shares, a right to contribution arose; and the whole was recovered in an action against the bankrupt, who had obtained his certificate: the defendant not having pleaded in abatement. *Wright v. Hunter*, Vol. v. 792.

5. A fair dissolution of partnership between two; one retiring, and assigning the partnership property to the other; and taking a bond for the value and a covenant of indemnity against the debts; the other continued the trade separately a year and a half, and then became a bankrupt. The Lord Chancellor was of opinion, the joint creditors had no equity attaching upon partnership effects remaining in specie; and at all events such a claim ought to be by a bill, not a petition. *Ex parte Ruffin*, Vol. vi. 119.

6. Where one partner is an infant, or lunatic, there cannot be a joint commission of bankruptcy against the others; separate commissions must be taken out. *Ex parte Layton*, Vol. vi. 440.

7. In bankruptcy among partners, concerned also in other trades, the paper of one firm being given to the creditors of another, dividends were allowed out of both estates. *Ex parte Bonbonus*, Vol. viii. 546.

8. A partner cannot claim in competition with a creditor until his demand is satisfied. *Ex parte Reeve*, Vol. ix. 581.

9. An uncertificated bankrupt entering into trade by himself, or in partnership, can only acquire property, not for himself or his new creditors, but for the assignees under the existing commission; held therefore that the creditors of that partnership had no equity against the assignees in respect of property so acquired. *Everett v. Backhouse*, Vol. x. 94.

10. Where one of two partners becomes bankrupt, the joint property must be administered as if both were bankrupt, in order to ascertain the surplus after an account of the joint debts, and an application of the joint property to satisfy them, which constitutes the separate interests. *Ibid.* 98.

11. Where upon one of three partners retiring, with a bond for the balance, and an indemnity, and the remaining partnership afterwards became bankrupt, held that the stock, &c. being clearly within the order and disposition of the bankrupts, was not to be applied in satisfaction of the creditors of the old, in preference to those of the new firm. *Ex parte Fell*, Vol. x. 347.

12. Payment of dividend under a commission of bankruptcy against one partner raises a new assumpsit by the other, depriving him of the benefit of the statute of limitations. *Dewdney, ex parte*, Vol. xv. n. 499.

13. A partner cannot claim in competition with the joint creditors. *Ex parte Kendall*, Vol. xvii. 521.

14. One partner bound by the other's signature of a bankrupt's certificate, after dissolution of the partnership. *Ex parte Hall*, Vol. xvii. 62.

15. Equitable rights of partners, subject to the joint debts, depending upon the result of the account between them; therefore, under a joint

commission of bankruptcy, the separate estate of one has a lien on the other's share of a surplus of the joint estate in respect of a debt, proved under bills, drawn in the name of the firm for a separate debt; and may come in with the other separate creditors for the deficiency. *Ex parte King*, Vol. xvii. 115.

16. A partnership without articles, and for an indefinite period, may be dissolved by any partner at any time without previous notice, subject to the engagements for the partnership; but the existence of engagements with third persons cannot prevent the right of dissolution as among themselves. *Featherstonehaugh v. Fenwick*, Vol. xvii. 298.

17. The consequence of the dissolution of partnership, where there are no articles prescribing the terms, as a general sale and account of the joint property; one or more of several partners therefore cannot insist on taking the share of another at a valuation; or that he shall remove his proportion from the premises, thereby securing the goodwill. *Featherstonehaugh v. Fenwick*, *Ibid.* 298.

18. Partner, after dissolution of the partnership continuing to trade with the joint property, must account for the profits. *Ibid.* 298.

19. Lease of premises where a partnership trade was carried on, renewed by one partner in his own name clandestinely; a trust for the partnership to be accounted for as joint property. *Ibid.* 298.

20. Distinction as to partners with reference to third persons, and as between the partners themselves.

21. Partner as to third persons, by a specific interest in the profits as such; not by receiving a sum of money, even in proportion to a

given share of the profits. *Ex parte Hamper*, Vol. xvii. 403.

22. Execution by a separate creditor against joint property, subject to account; ascertaining the specific interest of the partner in the joint effects. *Ibid.* 407.

23. Dormant partner, not an ostensible contracting party; a creditor may, but is not bound to go against him. *Ibid.* 412.

24. The interest of each partner is his share of the surplus, subject to all the partnership accounts; and that interest only is liable to the execution of a creditor. By the bankruptcy of one, his interest is divested, and vests in his assignees, by relation to the act of bankruptcy, therefore joint creditors under judgment in foreign attachment of the same date with the commission, but subsequent to the act of bankruptcy, cannot have execution against the joint property, which must be applied among all the joint creditors. *Dutton v. Morrison*, Vol. xvii. 193.

25. *Quere*, If a separate creditor, taking a moiety of a partnership chattel in execution, takes only that interest which the partner, his debtor, would have been entitled to after the account? *Hamper, ex parte*, Vol. xvii. 407.

26. In bankruptcy of one partner, a joint creditor not permitted to bring an action, and by execution fasten upon a moiety of the effects, but the joint effects are taken by the assignees, and distributed as far as the joint property goes, and the surplus, if any, applied under all the equities subsisting between the partners themselves. *Ibid.*

27. One partner acts for all almost universally in bankruptcy; proving debts, voting for assignees, and signing certificates. *Ex parte Hodgkinson*, Vol. xix. 293.

Various acts in bankruptcy by one partner for all. *Ibid.* 297.

[Q.] IN CASE OF MORTGAGES AND OTHER SECURITIES.

1. A mortgage upon a bankrupt's estate being deficient, the mortgagee proving the remainder of his debt under the commission cannot charge interest beyond the date of the commission. *Ex parte Badger*, Vol. IV. 165.

2. The Lord Chancellor has no authority in bankruptcy, to compel a second mortgagee, not claiming under the commission, but resting on his security, to join in a sale obtained by a prior mortgagee under the general order, 8th May, 1794, not producing enough for both mortgages. *Ex parte Jackson*, Vol. V. 357.

3. Mortgage of wood and underwood. It is not waste by the mortgagor in possession to cut underwood at seasonable times, and of proper growth. But being a bankrupt, an injunction was granted on the right of the mortgagee to have the estate sold in the plight in which it was at the bankruptcy, and to prove the rest of his debt. *Hampton v. Hodges*, Vol. VIII. 105.

4. Order in bankruptcy on petition for sale of premises, subject to an equitable mortgage: the general order (8th March, 1794,) applying only to legal mortgages. *Ex parte Payler*, Vol. XVI. 434.

5. Mortgagee having given up his mortgage, and proved under a commission of bankruptcy against the mortgagor, not allowed to retract. *Ex parte Downes*, Vol. XVIII. 290.

6. Equitable mortgagee must pay the costs of his petition in bankruptcy. *Ex parte Warry*, Vol. XIX. 472.

7. Short bill in the hands of a

bankrupt as agent, and not by consent, or the course of dealing, considered as cash, to be returned; or the proceeds received after the bankruptcy; though the bill was due previously, and retained so as to discharge the indorser. *Ex parte Sellors*, Vol. XVIII. 229. and *infra*, 24.

8. Distinction as to short bills, to be returned on bankruptcy. *Ex parte Mc Gae*, Vol. XIX. 610.

9. Holder of note gave it up on receiving an order to pay out of purchase money. It was not accepted, but purchaser verbally agreed to give notice to attend, when the deeds and money were ready. He did attend accordingly, but before the business was over, drawer was arrested and soon after made bankrupt; holder had a lien, the order not being given in contemplation of bankruptcy, though he knew drawer to be insolvent at the time. *Yeates v. Groves*, Vol. I. 280.

10. Held in bankruptcy, that after a voluntary discharge by agreement, the creditor cannot make use of a security against third persons; where the effect would be to make the party discharged again liable, though in another form, and in the shape of the demand of another person. *Mawson v. Stock*, Vol. VI. 305.

11. Creditor having securities of third persons to a greater amount than the debt, may prove and receive dividends upon the full amount of the securities to the extent of 20s. in the pound upon the actual debt. *Ex parte Bloxham*, Vol. VI. 449. *Post Pl.* 109.

12. Creditor having securities of third persons to a greater amount than the debt, may prove and receive dividends upon the full amount of the securities to the extent of 20s. in the pound upon the actual

debt. *Ibid.* Vol. vi. 600: *Ante Pl.* 106.

13. A creditor living in England, and subject to the bankrupt laws, having attached the estate of the bankrupt abroad, must restore it. *Benfield v. Solomons*, Vol. ix. 80.

Where, therefore, the bankrupt filed a bill against mortgagee of estates in England and Barbice, for an account and payment of balance to the assignees of the mortgagor, charging collusion generally, but did not aver that there would be any surplus, nor charge any direct application to the assignees to sue, demurrer was allowed. *Ibid.* 77.

So, real estates in Scotland have been sold under a commission. *Ibid.* 81.

14. At law the whole interest in the property, subject only to the distinction as to the local situation, is after the bankruptcy legally vested in the assignees, and in most cases they must declare expressly as such. *Ibid.* 83.

15. Security made by a debtor insolvent, his effects under execution, and not two months before bankruptcy, upon a previous application of a creditor ignorant of those circumstances, the Lord Chancellor thought it valid; but permitted the assignees to bring an action. *Ex parte Scudamore*, Vol. iii. 85.

16. Delivery of effects in contemplation of bankruptcy to a creditor, though standing perfectly *bonâ fide*, is bad, if voluntary and without pressure. *Ibid.* 88.

17. Preference in contemplation of bankruptcy, however moral the act, void. *Joseph, ex parte*, Vol. xviii. 342.

18. A party having an equitable lien upon title deeds of a bankrupt, which he delivered up on receiving the balance arising from the sale of premises, held not to have parted

with his lien; when it appeared that the purchaser was one of the assignees, and who re-sold the premises at a considerable profit, carrying the produce to the account of the estate; but such lien was, under the circumstances, a question between the petitioner and the creditors, and not between the petitioner and such assignee. And see *Ex parte Lacy*, Vol. vi. 625.

19. Creditor having a joint and several security must elect against which estate to go in the first instance, and if he elect to go as a joint creditor, he has no better claim than other joint creditors upon the surplus of the separate estate. *Ex parte Bevan*, Vol. x. 107.

20. Distinction as to a security, *præmium pudoris*. *Ex parte Mumford*, Vol. xv. 289.

21. Proof in bankruptcy under a security for more than the debt expunged: but security or satisfaction taken after a docket struck, not followed by a commission, though it cannot be retained, and may amount to a contempt, is not within the statute 5 Geo. 2. c. 30. § 24. The original debt therefore not forfeited. *Ex parte Browne*, Vol. xv. 472.

22. A bond assigned as security for money paid to the use of a person who had committed a secret act of bankruptcy, cannot be retained against the assignees under the bankruptcy. *Hammersley v. Purling*, Vol. iii. 757.

23. Where a security was delivered before bankruptcy, which, without indorsement, would be a nullity, and was indorsed after, held valid. *Ex parte Greening*, Vol. xiii. 206.

24. Short bills remitted by a country bank to their banker in London, standing at the bankruptcy of the latter, entered short in the usual way; not being due.

Ordered on petition in the bankruptcy to be delivered up by the assignees to the country bank; who, not being creditors when the petition was presented, the cash balance being against them, had since become so, turning it in their favour by taking up the bankruptcy acceptances on their account.

The order was made without requiring the petition to be amended by stating that fact, but upon consent of the crown holding an extent for acceptances of the bankrupt, on account of duties received and remitted specifically by the country bank. *Ex parte Rowton*, Vol. xvii. 426.

Whether the debt, so constituted, can be altered by taking the acceptance, or it is to be considered only as a collateral security, *Quære. Ibid.* 431.

25. Creditor's right in bankruptcy to prove and avail himself of all collateral securities from third persons to the extent of 20s. in the pound. *Ex parte Parr*, Vol. xviii. 65.

26. Bankrupt's property pledged must be sold, and the excess proved as a debt. *Ex parte Jepson*, Vol. xix. 231.

[R.] JOINT AND SEVERAL COMMISSIONS.

1. One partner absconded, and died abroad; but never was a bankrupt: separate commission against the other, under which the assignees seized joint effects: the joint debts are to be first paid out of the joint fund, the residue divided between the bankrupt's estate and the representative of the deceased partner. *Hankey v. Garret*, Vol. i. 236.

2. Separate commission of bankruptcy against one partner: the other paid the joint debts: a debtor to the partnership being also a separate creditor of the bankrupt was

allowed, upon petition, to set off against the bankrupt's share of the joint debt, and to prove the residue of his separate debt, the solvent partner consenting to receive his share. *Ex parte Quintin*, Vol. iii. 248.

Bankruptcy of a person, who has agreed to purchase, does not discharge the contract. *Ibid.* 255.

3. Upon petition of joint creditors to be admitted to prove under a separate commission it was ordered, that they shall be admitted; but not to receive a dividend; and that the dividend shall be reserved, till an account is taken of what they have or might have received from the partnership effects. *Ex parte Elton*, Vol. iii. 238.

4. Joint creditor a good petitioning creditor under a separate commission. *Ibid.* 239.

5. Commission of bankruptcy is not now treated as an execution; for the distribution is equitable. *Ibid.* 239.

6. Separate creditors cannot take a dividend upon the joint estate rateably with the joint creditors; each estate is applicable to its own debts. *Ibid.* 240.

7. In bankruptcy the usual directions are to apply the funds respectively; the joint to the joint debts, the separate to the separate debts; the surplus of each to the creditors remaining on the other. *Ibid.* 241.

8. Separate creditors having received 20s. in the pound are not entitled to interest out of the surplus of the separate estate, until the joint creditors are paid 20s. in the pound. *Ex parte Clarke*, Vol. iv. 677.

9. Contribution decreed between the joint and separate estates; the former having paid beyond the proportion of a debt to the crown under an extent, and the bankrupts being

bound jointly and severally. *Rogers v. Mackenzie*, Vol. iv. 752.

10. Upon the proof of a joint debt upon a separate commission of bankruptcy, no dividend can be taken till the separate creditors have received 20s. in the pound. *Ex parte Abell*, Vol. iv. 837.

11. In bankruptcy the joint estate is to be first applied to the joint debts, and, after they are paid, the surplus, if any, to the separate debts, and *vice versa* as to the separate estate. *Ibid.* 840.

12. A separate commission of bankruptcy established, though the other partner died before the assignment. *Ex parte Smith*, Vol. v. 295.

13. Upon a separate commission of bankruptcy, the benefit of an insurance effected by the bankrupt upon his own account on a ship, of which he was joint owner, is not liable to the joint creditors. *Ex parte Parry*, Vol. v. 575.

A similar decision was made by Lord Eldon, Chancellor, in *ex parte Browne*, 13th June, 1801.

14. Joint commission of bankruptcy superseded on the ground of the infancy of one partner, on the petition of the assignees under a separate commission. *Ex parte Barwis*, 601.

15. Joint creditors admitted to prove under a separate commission for the purpose of keeping separate accounts, and assenting to or dissenting from the certificate, but not to receive dividends with the separate creditors. *Ex parte Clay*, Vol. vi. 813.

16. Upon a separate commission of bankruptcy the benefit of an insurance effected by the bankrupt upon his own account upon joint property is not liable to the joint creditors. *Ex parte Browne*, Vol. vi. 136.

17. Separate creditors, who had taken a joint security, permitted on giving it up to resort under a commission of bankruptcy to their original debts. *Ex parte Lobb*, Vol. vii. 592.

18. Under a joint commission of bankrupt the affairs of the separate creditors may be arranged, and also of separate firms of two or more of the partners. Vol. viii. 545.

19. On a separate commission upon petition of a joint creditor, joint creditors permitted to prove for the purpose of voting in the choice of assignees and receiving dividends, provided they would pay the separate creditors. *Ex parte Chandler*, Vol. ix. 35.

20. Joint creditor, being petitioning creditor under a separate commission, admitted to prove and vote as the separate creditors. *Ex parte Hall*, Vol. ix. 349.

21. In bankruptcy the joint creditors cannot touch the separate estate until the separate creditors are satisfied. *Gray v. Chiswell*, Vol. ix. 124.

22. Cases of mistake, &c. differ in respect of the intention of the transaction, the decree goes upon intention. *Ibid.*

23. Joint creditors cannot vote in the choice of assignees under a separate commission, neither can they interfere. *Ex parte Alcock*, Vol. xi. 603.

24. Joint creditors cannot be admitted to vote in the choice of assignees under a separate commission, unless they pay the separate creditors 20s. in the pound. *Ex parte Hubbard*, Vol. xiii. 424.

25. A joint creditor, who was the petitioning creditor under a separate commission, held entitled to receive a dividend out of the separate estate; the petitioning creditor not being within the rule excluding

other joint creditors. *Ex parte Ackerman*, Vol. xiv. 604.

26. Assignees under separate commission cannot come upon joint estate for a sum brought into the partnership beyond his share, for creditors rely only on the ostensible state of the fund. *Lodge, ex parte*, Vol. i. 167.

27. Proof by joint creditors under a separate commission, there being no joint estate or solvent partner. *Ex parte Sadler*, Vol. xv. 52.

28. A second commission against an uncertificated bankrupt cannot be maintained; whether separate or joint. *Ex parte Martin*, Vol. xv. 114.

29. A joint commission of bankruptcy void as to one partner, cannot be maintained against the other. *Ibid.* 115.

30. The former course of bankruptcy was, that a joint and a separate commission stood together. Now the joint commission alone stands: the assignees can at law recover both the joint and separate estate; and the same distribution is made as if both commissions stood. *Ibid.*

31. Assignees under a separate commission of bankruptcy against a partner, though generally they cannot engage in new adventures, may with consent of the creditors and bankrupt. *Crawshay v. Collins*, Vol. xv. 228.

32. Joint creditor may take out a separate commission of bankruptcy, and receive dividends. *Ibid.* Vol. xv. 499.

33. Joint creditors admitted to prove under a separate commission of bankruptcy, for the purpose of assenting to or dissenting from the certificate, &c.: not to receive dividends with the separate creditors. *Ex parte Taith*, Vol. xvi. 193.

34. Separate commission of bankruptcy by a joint creditor. *Ibid.* 195.

35. A commission of bankruptcy against an uncertificated bankrupt is, strictly, void.

Formerly the course was to let joint and separate commissions stand together: now either is superseded, as may best answer the ends of justice, by arrangement: notice being given to the creditors under the first commission; the bankrupt in this instance having traded again in a distant place under another name. *Ex parte Crew*, Vol. xvi. 236.

36. Joint creditor taking out a separate commission of bankruptcy, may prove and receive dividends with the separate creditors; though as to part, a trustee for another joint creditor, who upon the general rule could have proved only to affect the certificate, not to receive dividends. *Ex parte Detastet*, Vol. xvii. 247.

37. Commission of bankruptcy in nature of an execution. *Ibid.* 251.

38. Joint creditors cannot prove under a separate commission of bankruptcy, for the purpose of receiving dividends, but only to assent to or dissent from the certificate. An account and application of the joint estate is directed on the application of any joint creditor; the residue to be distributed according to the respective interests of the partners. *Dutton v. Morrison*, Vol. xvii. 209.

39. Dormant partner by a share of the profits; but the property, by agreement belonging exclusively to the other; joint commission not supported, as the joint property would not be liable to execution under an action against the dormant partner. *Ex parte Hamper*, Vol. xvii. 403.

40. Objection to a joint commission that under a separate commission, the certificate had been ob-

tained, and lay before the Lord Chancellor for allowance. *Ibid.* Vol. xvii. 403.

41. Direction of the Lord Chancellor not exerted to increase the dividend, by throwing joint creditors of the bankrupts and a deceased partner upon his assets, in favour of creditors of the survivors only; the equity of joint creditors against the surplus of the separate estate, though the debt survives at law, being open to equitable circumstances: upon the state of the accounts, or subsequent dealing with the survivors, which may discharge the assets; and the equitable arrangement confining creditors to one of two funds, being admitted only in favour of creditors of the same debtor, except upon some special equity, as in case of drawer and acceptor, or principal and surety. *Ex parte Kendall*, Vol. xvii. 514.

42. Joint creditors not entitled to vote in the choice of assignees under a separate commission; the choice being in Commissioners who went in by their right under the act of parliament, not under an order. *Ex parte Longman*, Vol. xviii. 71.

General order in bankruptcy 18th March, 1794, not intended to alter the rights of joint and separate creditors with regard to each other. *Ibid.* 71.

43. Separate creditors not entitled to vote in the choice of assignees under a joint commission; on that ground a new choice directed, though the Lord Chancellor would not interfere if a creditor had been included by mistake, not for the purpose of preventing his voting. *Ex parte Parr*, Vol. xviii. 65.

Joint creditors cannot vote in the choice of assignees under a separate commission, even if there is only one separate creditor; but an arrange-

ment will be made for the joint creditors by order. *Ibid.* 70.

44. The choice of assignee is with the creditors entitled to prove under the act of parliament; excluding persons who could not be admitted without an order, as separate creditors under a joint commission, now admitted under the general order 8th. March, 1794. *Ibid.* 70.

45. Order for joint creditors to vote in the choice of assignees under a separate commission of bankruptcy; the petitioning creditor, a joint creditor consenting, and the only separate debt being under 10*l.* *Ex parte Jones*, Vol. xviii. 283.

46. Order for joint creditors to vote in the choice of assignees under a separate commission of bankruptcy; the petitioning creditor a joint creditor, whose debt overbalanced the separate debts, consenting. *Ex parte Taylor*, Vol. xviii. 284.

47. Right of joint creditors under a separate commission of bankruptcy to an account and application of joint effects, limited as to the separate estate to the surplus, not voting in the choice of assignees. *Ex parte Wilson*, Vol. xviii. 442.

48. Separate creditors not entitled to vote in the choice of assignees under a joint commission of bankruptcy. *Ex parte Jepson*, Vol. xix. 224.

49. Joint commission of bankruptcy on affidavit of debt, and bond, sworn, and executed, by one partner on behalf of all. *Ex parte Hodgkinson*, Vol. xix. 291.

[S.] BANKRUPTS' PRIVILEGES, ALLOWANCE, LIABILITY.

1. Defendant at law having lain two months in prison was made a bankrupt, and discharged under a supersedeas, the plaintiff not having proceeded for two terms: the

plaintiff then proved his debt under the commission; and before a dividend took the bankrupt in execution in a fresh action: the bankrupt's petition for an order on the plaintiff to release him was dismissed. *Ex parte Callow*, Vol. III. 1.

2. Payment under process, if without notice, may be in course of trade and good. *Ibid.* *Ex parte Farr*, Vol. IX.

3. A bankrupt, pending a commission, has a right to an inspection in respect of the surplus; and the Lord Chancellor will take care, that at the close of it he shall have justice: but in this case the bankrupt was not permitted to surcharge and falsify in the Master's office the accounts settled by the Commissioners long ago: though palpable errors specifically pointed out by a short petition would be rectified. *Twogood v. Swanston*, Vol. VI. 485.

4. The privilege of a party, attending his own cause, from arrest extends to a bankrupt on his return from attending his petition for leave to surrender, after expiration of the time; having deviated no farther than to call on the solicitor to arrange the proper steps for giving effect to the order. *Ex parte Jackson*, Vol. XV. 116.

5. A detainer, before the defendant could be discharged from an illegal arrest, as where he was returning from his examination under a commission of bankruptcy against him, cannot be supported. *Ex parte Hawkins*, Vol. IV. 691.

6. Protection of a bankrupt from arrest under an extent, while attending the Commissioners on the day appointed for his examination, and remaining in another room in the same house during an interval of adjournment on that day, on the general principle of law, protecting a witness. The order to discharge

made on the gaoler, not, as in the case of a private creditor, on the party. *Ex parte Russell*, Vol. XIX. 163.

7. Bankrupt ordered to be discharged from arrest and subsequent detainers, he being *bonâ fide* on the way to his examination, though he had deviated: order made in bankruptcy. *Ogle's case*, Vol. XI. 556.

8. Bill, after proof under a commission against the acceptor, was paid by the drawer; who, after a dividend, having arrested the bankrupt for the balance, and being also a surety for him on another bill, was ordered to discharge him, and restrained from lodging any detainer under the statute 49 Geo. 3. c. cxxi. §. 8 and 14. *Ex parte Lobbon*, Vol. XVII. 334.

9. What may be retained as his necessary wearing apparel within the terms of the exception, must be determined by him at his last examination, at the peril of indictment. *Ex parte Ross*, Vol. XVII. 374.

10. Right of a bankrupt, without regard to his conduct in an inspection of his books, &c. under the statute 5 Geo. 2. c. xxx. §. 5. for the purposes of his examination, to a list of his debts proved, and to have wearing apparel delivered up to him.

11. The disability of a bankrupt to sue is not to work injustice; therefore when he states that apparent incumbrances are no substantial charge, and can give security, the Court will order the assignees to permit him to use their names to enable him to recover; indemnifying them. *Benfield v. Solomons*, Vol. IX. 84.

12. The principle which obtains on petition is quite different from that which obtains in a suit: in the latter, the plaintiff could not offer to redeem without paying what was

due; but by the jurisdiction in bankruptcy, upon a petition properly verified and unanswered, the security is cut down altogether, even for sums actually advanced. *Ibid.* 84.

Creditor may be permitted to sue debtor in equity, upon collusion between the executor and the debtor; but, *Quære*, What is sufficient to constitute collusion? *Ibid.* 86.

13. Bankrupt, seized for life with a general power of appointment, with remainder in default of appointment, to the heirs of his body, cannot be compelled by decree in equity to execute the power for his creditors. *Thorpe v. Goodall*, Vol. xvii. 388. 460.

14. Injunction against a bankrupt vexatiously disputing his commission. *Ibid.* 393.

15. Upon the bankruptcy of an executor and trustee directed by the will to carry on a trade, but a limited sum allowed for that purpose; held, that only the property declared to be embarked in the trade, and not the general assets of the testator, are responsible to the creditors of the trade. *Ex parte Garland*, Vol. x. 110.

16. A bankrupt cannot file a bill of redemption in respect to his right to the surplus; but when he has a clear interest, and the assignees refuse, the Lord Chancellor will, upon petition and an offer of indemnity, compel them to let him use their names. *Spragg v. Binkes*, Vol. v. 590.

17. Whether a bankrupt, or any person in the same circumstances, can impeach the commission upon a prior act of bankruptcy and a debt sufficient to support a commission, of which a third person may avail himself, as a defence to an action by the assignees. *Quære*. *Ex parte Hay*, Vol. xv. 4.

18. Upon a second bankruptcy no allowance to the bankrupt: the estate not paying 15s. in the pound. *Ex parte Gregg*, Vol. vi. 238.

19. Liability of bankrupt's property, notwithstanding certificate under a second commission, not paying 15s. in the pound, only by judgment in an action; not to be taken by the assignees under the commission. *Ex parte Hodgkinson*, Vol. xix. 291.

20. The time enlarged for a bankrupt, who had omitted to finish his examination: but the order would not discharge a prosecution for the felony. *Ex parte Ricketts*, Vol. vi. 445.

21. Proceedings in bankruptcy ordered to be deposited in the office, sometimes with a view to a criminal prosecution, as for a conspiracy; so, if the bond is assigned: which remedy, as being limited to the penalty, is less beneficial than an action on the case. *Warren, ex parte*, Vol. xix. 163.

22. Bankrupt committed for contempt upon grounds which afterwards failed, held not entitled to be discharged from intermediate detainers. *Ex parte Dumbell*, Vol. x. 328.

23. Bankrupt represents his estate, until assignees are chosen. *Ex parte Ansell*, Vol. xix. 217.

[T.] BANKRUPT'S WIFE.

1. Assignees of a bankrupt must make a provision for his wife out of all her property, which can be obtained in equity only; and a settlement before marriage of part of her property to her separate use does not bar her. *Burdon v. Dean*, Vol. ii. 607.

2. The equity of a wife to have a provision out of her trust property claimed by the husband attaches

upon newly acquired property. *Ibid.* 608.

3. Assignees of bankrupt taking his wife's fortune out of the court must make a provision for her. They consented to give her half. *Brown v. Clark*, Vol. III. 167.

4. Assignees of a bankrupt, defendants in respect of an interest in his wife, cannot take it without making a provision for her. *Freeman v. Parsley*, Vol. III. 421.

5. Assignees of a bankrupt claiming property in right of his wife must make provision for her. *Lamb v. Milnes*, Vol. v. 517.

6. Though a bond by a husband to pay a sum in the event of his bankruptcy or insolvency to trustees for the purpose of settlement cannot stand against the creditors, the property of the wife may be limited to the husband, until he becomes bankrupt, &c. and from that event for his wife and children; and where in articles for such a settlement the husband covenanted to give a bond for 5,000*l.* upon the same trusts, and had received all her fortune without making any settlement, proof was admitted under his bankruptcy, not only for the amount of her property agreed to be settled, but the 5,000*l.* or so much as the value of the property of the wife would extend to, beyond the sum agreed to be settled. *Ex parte Cooke*, Vol. VIII. 353.

7. Husband is bound to make good the representation of his property, on the faith of which the marriage was had: widow of a bankrupt therefore held entitled to prove under an engagement by the settlement. *Ex parte Gardner*, Vol. XI. 40.

8. Limitation of a wife's property until the bankruptcy of her husband, or a lease determinable on the bankruptcy of the lessee, good. *Higinbotham v. Holmes*, Vol. XIX. 92.

9. Settlement on marriage of the wife's fortune in case of bankruptcy of the husband, though in the form of a bond by him: but as his bond, affecting his property, it is void as against the creditors. *Ex parte Hodgson*, Vol. XIX. 206.

10. Settlement on marriage of freehold estates of inheritance, and leaseholds for lives and years, by a man, not indebted, in trade, or intending it, to the use of himself for life, unless he shall embark in trade, and in the life of his wife, become bankrupt, and from his decease or bankruptcy to secure an annuity for his wife; and, subject thereto, for his heirs, executors, &c. on his afterwards engaging in trade and becoming bankrupt void as against his creditors. *Higinbotham v. Holme*, Vol. XIX. 88.

[U.] SET-OFF AND MUTUAL CREDIT.

And see tit. SET-OFF, 6, 7.

1. Part-owners of a ship, so far partners that their proportion in a joint debt due to the partnership cannot be set off against their separate debts to the bankrupt's estate. *Ex parte Christie*, Vol. X. 105.

2. One of several partners becoming bankrupt, Court refused to allow a debt to the joint firm to be set off against a claim of the joint debtor to the separate estate. *Ex parte Twogood*, Vol. XI. 517.

3. Assignees to be subject to all equities attaching upon the bankrupt; petitioner therefore having a separate demand against the estate, allowed to set that off against the joint debt of himself and his surety. *Ex parte Hanson*, Vol. XII. 346.

In bankruptcy the jurisdiction is equitable as well as legal. *Ibid.*

4. Bill accepted by a party for a debt due to the bankrupts before the bankruptcy is a mutual account, and

within the statute as a mutual credit. *Ex parte Wagstaff*, Vol. XIII. 65.

5. Set-off in bankruptcy of a debt of the bankrupt to one partner separately, against a joint debt of him and his partner on their bond, to secure the separate debt of the former. *Ex parte Hanson*, Vol. XVIII. 232.

[V.] STAT. 21 JAC. &c.

1. *Quære*, Whether shares of a ship not at sea are within 21 Jac. 1. c. xix. § 10, 11.; or whether transfer of bill of sale is sufficient delivery of possession, and how affected by the registry act? *Ex parte Stadgroom*, Vol. I. 163.

2. A question arising in equity, which prevents the assertion of a legal right, does not alter the tribunal. The court will not therefore determine a question of partnership in the event of a bankruptcy, any more than of a death, or a claim as heir without a trial at law, unless perfectly satisfied, though the evidence is all in support of the claim. The Court expressed doubt, whether, stock in trade, being in the possession of the bankrupt solely, the claim of partnership could be sustained upon 21 Jac. 1. c. xix. § 10. *Binford v. Dommett*, Vol. IV. 736.

3. Debts are within the statute 21 Jac. 1. c. xix. § 10, 11. *Ex parte Ruffin*, Vol. VI. 128.; and S. P. *Ex parte Williams*, Vol. XI. 7.

4. A mere gift of money by the bankrupt to his son not within the statute, 1 Jac. 1. c. xv. *Ex parte Shorland*, Vol. VII. 88.

5. Purchase by a man in the joint names of himself and his wife, if he was a trader at the time, and he afterwards becomes bankrupt, is void against the creditors, within the statute, 1 Jac. 1. c. xv. § 5. So, if the purchase was made with the wife's

money, if previously received and disposable by him as his own; not bound by any agreement with a trustee; and the receipt not connected with the purchase. *Glaister v. Hewer*, Vol. VIII. 195.

6. Mortgages of real estates are not debts within the 21 Jac. 1. c. xix. § 10, 11. whether original or by assignment, and though secured by bond or covenant. *Jones v. Gibbons*, Vol. IX. 407.

7. To effect a valid assignment of debts within the statute, there must be a delivery of the security and notice to the debtor, who might otherwise make payment to the original creditor. *Ibid.* 410.

To constitute a valid assignment of a mortgage no notice is necessary, by assignment of the mortgage the debt necessarily passes. *Ibid.* 411.

Where bankrupt had deposited a mortgage and bond, without notice, his assignees were decreed to make a valid assignment. *Ibid.*

8. Furniture, &c. in possession of a bankrupt according to the title under a trust, does not pass to the assignees under statute 21 Jac. 1. c. xix. § 11. *Ex parte Martin*, Vol. XIX. 491.

9. Purchase in the name of bankrupt and his wife, void against creditors, within the stat. 21 Jac. 1. c. xv. § 5. *Glaister v. Hewer*, Vol. IX. 12.; S. C. Vol. XI. 377.; and *supra*, 5.

10. Bills, remitted by a country bank to their banker in London, remaining at his bankruptcy in his hands undue, or unapplied according to the authority given, or afterwards coming to the hands of the assignees, and the proceeds received, restored and paid to the remitters, taking up the acceptances on their account, and subject to the banker's lien for any balance; by the con-

tract remaining the property of the remitters, in the hands of the banker as agent for a particular purpose, viz. to hold until due, and receive the proceeds, then first forming an item in the cash account. The circumstance of the bill being written short is only evidence of a trust, proved in this instance by express declaration, or other evidence equivalent. *Ex parte Pease*, Vol. XIX. 25.

11. The statute 21 Jac. 1. c. xix. § 11. not applicable to bills in the hands of a banker, written short, or sent for a particular purpose: the trust accounting for the possession; being considered as goods in the hands of a factor, with the single distinction that he cannot pledge; but if the bills are dealt with before bankruptcy, the money cannot be followed; as, if dealt with afterwards, it may. *Ibid.*

[W.] SOLICITOR.

And see ATTORNEY, *passim*.—LIEN, 14, 15.

1. Order in bankruptcy under the act 2 Geo. 2. c. xxiii. § 22. to tax a solicitor's bill for striking the docket and a journey to get an affidavit of debt; being business relating to the bankruptcy, though previous to it. *Ex parte Smith*, Vol. v. 706.

2. Purchase of a bankrupt's estate by the solicitor to the commission set aside. The Lord Chancellor would not permit him to bid upon the resale, discharging himself from the character of solicitor, without the previous consent of the persons interested, freely given, upon full information. *Ex parte James*, Vol. VIII. *Ibid.*

3. Purchase by the assignee and solicitor under a commission of bankruptcy of dividends cannot be for their own benefit. *Ibid.*

4. The principle against purchases by trustees of the trust property most strictly applicable to assignees in bankruptcy and their agents. *Ex parte James*, Vol. VIII. 350.

5. Solicitor to the commission is incapable of purchasing either for himself or for others; when, therefore, he was also acting as solicitor for the purchaser, sale set aside. *Ex parte Bennett*, Vol. x. 381.

6. Order to tax an attorney's bill within the jurisdiction in bankruptcy: the right subsisted long before the statute. *Ex parte Arrow-smith*, Vol. XIII. 124.

And *infra*, [X.] 2.—[CC.] 3.

[X.] MESSENGER.

1. The messenger under a commission of bankruptcy was put out of possession of property on board a ship by threatening to throw him overboard: the parties also using contemptuous language, ordered to give security for answering the bankrupt's interest. *Ex parte Dixon*, Vol. VIII. 104.

2. Court clearly has jurisdiction, as between a messenger (an officer appointed by the Court) and the solicitor to the commission employing him; and *semble* the latter is responsible, not only for the fees, but also the consequences of such employment, when the commission is not supported. The messenger, who had taken a note from the petitioning creditor for part of his claim (who had since absconded), permitted to bring an action for the residue and costs and damages against the solicitor. *Ex parte Hartop*, Vol. XII. 349.

3. Where a bankrupt disputed the validity of his commission in an action against the messenger, held that he was not to be permitted to inspect the proceedings. The as-

signees were directed to be at liberty to defend the action, or indemnify the messenger; and the solicitor of the bankrupt having originally also acted for the assignees, the Court, reprobating the practice, staid the trial until farther inquiry, and order made. *Vaughan, ex parte*, Vol. XIV. 513.

4. Contumacious obstruction of the messenger, under a commission of bankruptcy, treated as a contempt, though acting under the authority of the commissioners given by statute, not under the Lord Chancellor's order in bankruptcy; as in the case of commitment, upon which the Lord Chancellor can do no more than grant the writ of *habeas corpus*, as holding the great seal, not by his authority in bankruptcy. *Ex parte Page*, Vol. XVII. 59.

5. The messenger in bankruptcy is to enter and seize, at his own hazard, the property of the bankrupt; but if he enters the house and seizes the property of another, acting under authority, he cannot be turned out; but the party must take his remedy by law; and contemptuous language, or force, is a contempt of the great seal. *Ibid.*

6. Whether, after execution of the warrant of seizure of commissioners in bankruptcy, the messenger, having given up possession, can again seize without another warrant, *Quære. Ibid.*

[Y.] ACTIONS AND SUITS IN.

1. After judgment by default in an action on a dividend, under a commission, assignees filed a bill for discovery, and to have the proof expunged: demurrer allowed, the course being by petition. *Clarke v. Capron*, Vol. II. 666.

2. Petition to restrain an action by commissioners of bankruptcy against the assignees for costs of

defending an action against the commissioners and messenger for false imprisonment, in which the plaintiff was nonsuited, or for a contribution among the creditors, dismissed.

No distinction, exonerating creditors, who were absent: proving by affidavit they adopt all the proceedings. *Ex parte Linthwaite*, Vol. XVI. 235.

3. Property may be limited to a man to go over on a certain event, as bankruptcy; but while his property it must be subject to the incidents of property, and therefore to debts. *Brandon v. Robinson*, Vol. XVIII. 429.

4. Whether assignees under a commission of bankruptcy against the plaintiff, are made parties by bill of revivor, or supplemental bill, in nature of it, &c. *Quære. Ibid.* 423.

5. Limit of time to rehearing in bankruptcy proposed. *Ex parte Roffey*, Vol. XIX. 468.

And see ABATEMENT, 1, 2, 3.

[Z.] ORDERS IN.

1. Order for payment out of a bankrupt's estate, with interest to the time of payment, in preference to all other creditors, with costs, under statute 51 Geo. 3. c. 15, § 48. for an issue of Exchequer bills to relieve commercial credit. *Ex parte Holden*, Vol. XVIII. 436.

2. The Lord Chancellor refused to stay proceedings under a commission of bankruptcy, not opened, upon the allegation that there was no petitioning creditor's debt, the commission issuing of right under the act of parliament. *Ex parte Lanchester*, Vol. XVII. 512.

3. Insertion of adjudication of bankruptcy in the Gazette suspended by the Lord Chancellor, upon

inspection of the proceedings; the act of bankruptcy not being proved. *Ibid.* 513.

4. Discretion of the Lord Chancellor to stay a dividend in bankruptcy, for the general benefit of the creditors. *Ex parte Kendall*, Vol. xvii. 514.

5. Trust to pay the dividends, from time to time, into the proper hands of a man, or on his proper order, or receipt subscribed with his own hand, that they should not be grantable, transferable, or otherwise assignable by way of anticipation of any unreceived payment, or any part thereof: on his decease the principal to be paid to such persons as, in a course of administration, would become entitled to his personal estate, and as if it had been his personal estate, and he had died intestate. An interest for life in the dividends assignable under a commission of bankruptcy, with a limitation over of the principal to those entitled under the statute of distributions. *Brandon v. Robinson*, Vol. xviii. 429.

6. Order, on application of a bankrupt committed, to bring him again before the commissioners: if no effects, the fees to be paid out of future effects, if any; if recommitted, he would find it difficult to obtain another order. *Ex parte Cohen*, 294.

7. Order by Lord Thurlow, that a petitioning creditor, who has neglected to prosecute a commission of bankruptcy, shall not have another. *Ex parte Masterman*, Vol. xviii. 298.

8. After an order in bankruptcy for liberty to bring an action, with special directions for a production of papers, and not to set up the bankruptcy; a bill of discovery cannot be filed. *Cooke v. Marsh*, Vol. xviii. 209.

[AA.] PETITIONS.

1. A bankrupt, like a pauper, loses his privilege by misconduct: when, therefore, after two petitions dismissed, he presents a third for the same purpose, it will be dismissed with costs, and he be committed if unable to pay them; but the Court will not make an order restraining him from presenting any more. *Ex parte Shaw*, Vol. ii. 40.

2. Petition to prove is irregular, when the creditor did not go before the commissioners until after it was presented, and when brought to a hearing, without stating what passed before them. *Ex parte Wright*, Vol. ii. 41.

3. A petition in bankruptcy, praying distinct orders, under several commissions, requires several stamps. *Ex parte Wilson*, Vol. xviii. 439.

4. Bankrupt's right to petition in respect of his interest in the surplus. *Saxton v. Davis*, Vol. xviii. 72.

5. Affidavits to be used at the hearing of a petition to stay a bankrupt's certificate, in future to be brought into the office, together with the petition, except such affidavits as are necessary to be used in reply to any affidavits made in answer to such petition. *Ex parte Bowes*, Vol. xi. 540.

6. Petition for interest against an assignee, under the statute, for not paying in balances, with a prayer also for his removal, on totally groundless imputations, dismissed as to the whole; without prejudice to the presenting another petition for the single purpose to which the act was directed. *Ex parte Vernon*, Vol. xiii. 270.

7. The Court discourages petitions by commissioners in bankruptcy declining to act, merely to

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get the opinion of the Court. *Anon.* Vol. XIII. 590.

8. A petition to revive an order for trying the validity of a commission in an issue, upon that objection, which had not been prosecuted, and was discharged in 1803, dismissed with costs. *Ex parte Donovan*, Vol. xv. 6.

9. General order as to bankrupt petitions. Vol. xvi. 320.

[BB.] INTEREST.

1. In bankruptcy, a surplus after dividing to the full amount of principal and interest to the suing out of the commission; subsequent interest ordered, on petition of bond creditors, saving just allowances; and commissioners might give it without order, and need not stop but at want of assets; but no compound interest allowed. *Ex parte Morris*, Vol. i. 132.

2. In the case of surplus, under a joint commission, claim by the creditors of interest, subsequent to the date of the commission, is to be preferred to a debt due to the joint estate from the separate estate of one partner. *Ex parte Reeve*, Vol. ix. 588.

3. In case of a surplus coming to a bankrupt, creditors have a right to interest, wherever there is a contract for it appearing either on the face of the security, or by evidence. *Ex parte Mills*, Vol. ii. 295.

4. Under bankruptcy no interest beyond the penalty of a bond. *Ibid.*

5. Where debts did not carry interest by the contract, the Court made the bankrupt pay the contribution out of the surplus. *Ibid.*

[CC.] COSTS.

1. Costs personally against an uncertificated bankrupt, in a case of fraud and misconduct. *Lock v. Bromley*, Vol. iii. 40.

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2. Creditor coming in to prove before the master, costs not allowed, of course. *Abell v. Screech*, Vol. x. 355.

3. Where a country commission was superseded on the ground of fraud, the Court refused to charge the solicitor with costs, on the ground that he had not properly taken the account of the petitioning creditor's debt, but ordered him to be charged, for having deceived the Court, and taken out the commission against the order of Lord Rosslyn, as to barristers, &c.; an order, which *semble* on an application and a proper case, would be dispensed with. *Ex parte Conway*, Vol. xiii. 62.

4. Costs ordered to be paid, but not taxed until after the bankruptcy of the person to receive them, cannot be set off by the party, from whom they were due, proving a debt under the commission. *Ex parte Thomas*, Vol. xv. 539.

And Vide Supra (Q.)

BARON AND FEME.

And see ALIEN, 1.

—KIN, NEXT OF.

[A.] RIGHTS AND LIABILITIES OF HUSBAND.

[B.] INTEREST IN WIFE'S PROPERTY.

[C.] RIGHTS AND LIABILITIES OF THE WIFE IN RESPECT OF SEPARATE PROPERTY.

[D.] ——— TO SETTLEMENT.

[E.] ——— OF SURVIVORSHIP.

[F.] ——— OF MAINTENANCE.

[G.] JOINDER IN SUITS.

[A.] RIGHTS AND LIABILITIES OF HUSBAND.

1. The burthens to which a husband is liable are a consideration for his marital rights, upon which,

therefore, a fraud may be committed. *E. of Strathmore v. Bowes*, *Ibid.* 24.

2. Provisions by a marriage settlement not held a purchase of all the property of the wife; unless that purpose is expressed, or clearly imported. *Druce v. Denison*, Vol. vi. 385.

3. Where a woman conveys her property before marriage, without the privity of the intended husband, it is fraudulent, and will be set aside. *Bell v. Montgomery*, Vol. ii. 194.

4. Wife's evidence against husband allowed only for security of the peace, but she cannot sustain indictment against him. *Sedwick v. Watkins*, Vol. i. 49.

5. Husband is not to account for the income of his wife's separate estate, which she permitted him to receive. *Smith v. Lord Camelford*, Vol. ii. 698.

6. To prevent the marital right in property of a married woman, a clear intention, that it shall be to her separate use, must appear: a mere trust to pay the interest to her for life was held not sufficient: the capital being bequeathed according to her appointment, whether covert or sole, and in default of appointment, to her representatives, including her husband, was admitted to be to her separate use. *Lumb v. Milnes*, Vol. v. 517.

7. The Court refused to enforce a security upon rents and profits, settled in trust to receive and pay them yearly as received, to the separate use of a married woman; and upon the circumstances dismissed the bill with costs. *Mores v. Huish*, Vol. v. 692.

8. Where the marriage articles described the lady's fortune, to which she was entitled under a former settlement, as 4000*l.* generally, but the

representation did not amount to a warranty, and stated nothing beyond the terms of such former settlement, held that the husband was not entitled to have it made good in money; but it having been laid out in stock, by parties competent to do so, it must be so taken. *Ainslie v. Medlycott*, Vol. ix. 13.

Agreements before marriage, upon behalf of infants, by parents and guardians, will frequently bind the infants. *Ibid.* 19.

9. Wife's reversion, which cannot fall into possession during the husband's life, as if it be upon his death, not assignable by him. *Dalbiac v. Dalbiac*, Vol. xvi. 116.

10. Husband and wife, seised under the settlement for their lives successively, with remainders in strict settlement, and to the heirs of the wife, having no issue, joined in a mortgage, by fine, declaring the ultimate use to the survivor.

Declaration, or clear intention, equivalent to it, is necessary to change the use; and, no purpose appearing beyond the mortgage, the title of the wife was established against a claim under the husband surviving. *Innes v. Jackson*, Vol. xvi. 356.

11. Husband claiming his wife's fortune in equity; though there was a separate provision, the Court not thinking it sufficient, made him increase it. *Stackpole v. Beaumont*, Vol. iii. 98.

12. Trust under marriage settlement, for the next of kin of the wife, subject to her appointment by will, with two witnesses; appointment in favour of the husband, by an unattested will, being void, the children are entitled, not the husband, who is not of kin to his wife, and whose claim to her personal property is not in that character, under the statute, but *jure mariti*, and in this

case according to the plan of the settlement he was not intended. *Watt v. Watt*, Vol. III. 244.

13. Testator having proved the value of annuities, secured to the separate use of his wife, as a debt under the bankruptcy of the grantors, his assets were charged with the dividends only, upon the foot of that transaction, not with the annuities, as subsisting. *M'Lean v. Longlands*, Vol. v. 71.

14. Instances of a husband being committed, till his wife should do an act; but where he made it appear he could not prevail upon her, he was discharged. *Emery v. Wuse*, Vol. v. 848.

See AGREEMENT 31, DOWER 6, JURISDICTION 18, WILL 235.

[B.] HUSBAND'S INTEREST IN WIFE'S PROPERTY.

1. Settlement upon marriage of the wife's property only upon certain trusts for the husband, wife, and children; in one event for the husband absolutely; but making no provision for the event that happened: a resulting trust for the wife. *Langham v. Nenny*, Vol. III. 467.

2. Husband's interest by marriage in his wife's personal property, chose in action, or equitable interest. *Ibid.* 469.

3. A legacy to a married woman is not sufficiently reduced into possession by an appropriation by the executrix of a mortgage to the same amount, so as to prevent her survivorship upon her husband's death. *Blount v. Bestland*, Vol. v. 515.

4. Settlement of stock to the separate use of a married woman for life; and after her death for her husband absolutely. Decree upon the bill of the husband and wife for a transfer to him upon his personal security. *Chesslyn v. Smith*, Vol. VIII. 183.

5. Where the Court secures a provision for a wife out of her equitable interest claimed by the husband, the trustee is at liberty to pay to the husband; and that payment is not called back. No instance of the debtor calling upon the Court to interpose that equity for the wife. *Glaister v. Hewer*, Vol. VIII. 206.

6. Whether a jurisdiction in equity, to permit a married woman to give up her interest for life in a trust fund, not settled to her separate use, or subject to her appointment, analogous to a fine, can be maintained, *Quare*. The bill by the husband and wife against the trustees for this purpose was dismissed, as premature; the funds not being ascertained: the husband accountable to the trustees in respect of his receipts by their permission, unliquidated; and as to the part of the capital, the trust of which was for her appointment by deed or will notwithstanding coverture, no absolute appointment having been executed, but merely by way of indemnity to the trustees. *Sperling v. Rochfort*, Vol. VIII. 164.

7. A married woman, living in trade without the interference of her husband, residing in a different part of the kingdom, advanced money for the purchase of a share in the lottery, upon an agreement with the plaintiff, that half should be considered a loan to him, and they should be jointly concerned in the adventure. Held, that the money belonging to the husband, the produce was his; and the bill was dismissed. *Lamphir v. Creed*, Vol. VIII. 599.

8. Wife entitled under her father's will to a term for her life for her sole and separate use, and after her decease to her children equally, but no trustees were interposed; the husband having possession,

mortgaged the term, and afterwards obtained a beneficial reversionary lease, which he further mortgaged; held that his representatives were accountable for the trust, and that there was no distinction between the original and reversionary leases; and the mortgagee having notice, was affected with the equity, which was accordingly established. *Parker v. Brooke*, Vol. ix. 583.

9. Under a settlement expressed to be in consideration of the portion or fortune which the husband should receive upon the marriage; held that the husband was only a purchaser of the fortune he was actually to receive with her at the marriage, and that she was entitled to a provision out of a fund to which she was entitled as next of kin; and the administrator could not set off against such claim a debt due from the husband to the intestate's estate. *Carr v. Taylor*, Vol. x. 574.

Quære, As to the right of a husband to sue in his own name for the legal choses in action of his wife. *Ibid.* 580.

10. Where a wife was entitled to a legacy subject to a life interest, and she acquiesced in the payment of it to him during the life of the person entitled for life; held that her surviving right was barred by her husband having so reduced it into possession. *Doswell v. Erle*, Vol. xii. 473.

11. Husband entering into possession of the real and personal estate as executor, and not as husband, held that his wife's share of the residue could not be sufficiently deemed reduced into possession as to prevent its surviving to her representatives. *Baker v. Hall*, Vol. xii. 501.

12. Stock, the property of a married woman, not reduced into possession, so as to be vested in her

husband, by a transfer to him merely as a trustee. *Wall v. Tomlinson*, Vol. xvi. 413.

[C.] WIFE'S RIGHTS AND LIABILITIES IN RESPECT OF SEPARATE PROPERTY.

And see ELECTION, *passim*.—
STOCK, 14.

1. Will by a wife of her separate property and its produce, whether derived from her husband or a third person, good. *Fettiplace v. Gorges*, Vol. i. 46.

2. The moment a woman takes personal to her sole use, she has sole right to dispose of it; if she makes no disposition, husband succeeds as next of kin, not by marital right. *Ibid.* 49.

3. *Feme covert* is a *feme sole*, as far as the instrument creating her separate estate makes her proprietor; and if she pledges it according to her power, the trustees must hold to the uses she appoints; but whereshe, according to her power, appointed for the benefit of her husband, an inquiry into the circumstances was directed. *Pybus v. Smith*, Vol. i. 189.

4. Creditor of wife has a right in equity against her separate property, and against husband in respect of it, but not beyond it, if notice. *Lillia v. Airey*, Vol. i. 277.

5. Plaintiff with notice of separate allowance of the wife, a very weak woman, advanced to her wantonly beyond it; proof, that she received more than the demand she could make out; bill dismissed without account, the value being trifling. *Ibid.* 277.

6. Agreement by wife without knowledge of husband to pay additional rent out of her separate property, good. *Master v. Fuller*, Vol. i. 513.

7. A married woman is liable to creditors in respect of any separate property, though not from her husband; if they are separated by deed or sentence, the husband need not be a party to the action, but must if not so separated, though living apart. *D. of Bolton v. Williams*, Vol. II. 145.

8. Where there is an assignment by a married woman of her separate property in the hands of trustees, the assignee may come for execution of the trust, for her disposition is valid to the extent of her power; but a general creditor cannot come into equity to have his debt satisfied out of that property. *Ibid.* 150.

9. Equity will not make good against a married woman, a contract on which she cannot be sued at law. *Ibid.* 156.

10. *Feme covert* must elect between an annuity by will to her separate use for life, charged upon a devised estate, and a title paramount to part of the same estate in tail. Possession taken by her husband under that title does not preclude her election: but as it was manifestly the better interest, no inquiry was directed as to which would be most for her benefit. *Wilson v. L. John Townshend*, Vol. II. 699.

11. Trust in a deed of separation to permit A. to receive the dividends of stock for the maintenance and support of the wife, with a covenant of indemnity to her husband: a grant by her of an annuity out of the dividends was held void. *Hyde v. Price*, Vol. III. 437.

Quere, Whether a married woman, having a separate maintenance, can be sued as a *feme sole*? *Ibid.* 443.

A married woman, living apart from her husband, upon a separate

maintenance, cannot bind him by her contracts. *Ibid.* 445.

12. Dower barred by settlement previous to marriage, but during the infancy of the wife, of stock and leasehold property, partly the husband's, partly the wife's. *Chitty v. Chitty*, Vol. III. 545.

13. Husband under a decree to propose a settlement of stock belonging to his wife, transferred to the Accountant General by order, came to an agreement with her, out of Court; and while they lived apart, but not legally separated, to take part and give up the rest: this agreement does not bind the wife; and the husband dying before any steps were taken for executing it, the whole survived to the wife. *Macauley v. Philips*, Vol. IV. 15.

14. Husband is entitled to the income of his wife's equitable interest, unless he has received some fortune with her; or has misbehaved: as, by running away with a ward of the Court. *Ibid.* 15.

15. Difference between legal and equitable interests of the wife as to the right of the husband. *Ibid.* 18.

16. If a settlement of the wife's equitable interest had been approved and ordered by the Court, it is binding, notwithstanding the death of either party, before it is carried into effect. *Ibid.* 19.

17. Assignment for valuable consideration of the wife's equitable interest by the husband does not bar her equity. *Quere*, As to a trust of a term for years of land. *Ibid.* 19.

Action by the husband for a legacy due to his wife does not lie. *Ibid.* 19.

18. As to creditors of the husband, or persons dealing with a married woman as to the separate property, equity ought to go no farther than

to leave any legal right undisturbed; not to improve the security. *Carr v. Eastabrooke*, Vol. iv. 145.

19. Bequest in trust to pay the annual produce into the proper hands of a married woman, is a bequest to her separate use. *Hartley v. Hurle*, Vol. v. 545.

20. The consideration of marriage runs through the whole settlement; and especially supports every provision with regard to the husband and wife. She is interested in the provision for her husband, enabling him to provide for her and the children; and it is not affected by subsequent events, as the death of the wife without children. *Nairn v. Prowse*, Vol. vi. 752.

21. Devise upon trust to permit a *feme covert* to receive dividends of stock for her life to her own use, independent of her husband, held that she had the absolute property, and that she had power to assign it with her husband, to secure an annuity for her life. *Wagstaff v. Smith*, Vol. ix. 520.

22. Wife may make a will of property in trust for her separate use, and her husband taking a transfer is still a trustee; but she cannot make a will of any other property, without his assent. *Rich v. Cockell*, Vol. ix. 369.

23. *Quere*, If a party claiming independently of the will of a *feme covert*, as heir or husband, is to be put to election in respect of any property bequeathed by the will. *Ibid.*

The transfer to the husband of the wife's separate property cannot destroy the separate trust, unless clear evidence is produced to show that it was intended with her assent to destroy it. *Ibid.*

24. Where a *feme covert* has power by will to dispose of personal estate,

this Court requires to be satisfied by the judgment of the Ecclesiastical Court, that the instrument set up is in nature of a will, and after that proof in the Ecclesiastical Court, further requires the witnesses to be again examined, or their signature proved, before it pronounces it an appointment, when the essence of the appointment consists in that fact. *Ibid.* 366.

25. Reference to arbitration not permitted, where one of the parties was a married woman, neither would the Court allow a reference to the Master, whether it would be for her benefit, that the cause respecting her interest in a real estate should go to arbitration. *Davis v. Page*, Vol. ix. 350.

26. The Court supported a *bona fide* purchase, through the medium of trustees, by a *feme covert*, out of her separate estate from her husband (though he was indebted at the time), of furniture, pictures, &c. in the mansion-house. *Lady Arundell v. Phipps*, Vol. x. 139.

Purchase by the wife *bona fide*, it is immaterial whether before or after the marriage. *Ibid.* 145.

27. The mere possession of chattels amounts to no more than *prima facie* evidence of property in the man possessing, until a title not fraudulent is shown, under which that possession has followed. *Ibid.*

28. Court has frequently interposed to protect the enjoyment of a specific chattel, where value could not be estimated in damages. *Ibid.* 148; and *Nutbrown v. Thornton*, *Ibid.* 163.

29. Where money was vested in the hands of trustee to the wife's separate use, and subject to her appointment, and further, with power for trustee, with her consent, to invest, and a covenant on the part of

the husband, that he would not obstruct her in such execution, the husband afterwards obtained the money from the trustee, and laid it out in houses; but there was no satisfactory evidence that it was done in pursuance of any engagement, or as an application of the trust-fund: Court refused to establish a lien on such purchases on behalf of the wife, or to consider her a specialty creditor on his estate, in respect of the money so laid out. *Lench v. Lench*, Vol. x. 511.

30. Wife entitled to personal property settled in trust for her absolutely, if she should survive the husband, Court held that it had no authority to order, by her consent, upon examination, a transfer of the property to be made to her husband. *Richards v. Chambers*, Vol. x. 580.

31. Wife entitled to the dividends of stock standing in the name of trustees, and no settlement made upon her marriage, the husband granted an annuity, and assigned the dividends to secure it. The surety being called upon, pays some instalments of the annuity, and by his bill prayed to be repaid out of the dividends; the husband having quitted the kingdom without making any provision for his wife, she also, by bill filed against the trustees, prayed that the whole of the dividends might be paid to her. Upon the first, the Court held, that as the creditor was entitled to the benefit of all the securities the debtor has given his surety, the surety has as good an equity to the benefit of all the security the principal gives to the creditor; and accordingly directed the trustees to reimburse the surety, and to provide for accruing payments, and that even in the case of bail. Upon the second, the Court directed further inquiry, whether the husband had left the wife un-

provided for; and in that case, that she should be entitled to the remainder of the dividends. *Wright v. Morley*, Vol. xi. 12.

32. Wife having a reversionary contingent lifeinterest in stock, upon contract by her and her husband for sale of it, and bill for performance, her consent taken *de bene esse*, Court refused to take it as to the produce of two houses when sold, never taking a consent until the subject is ascertained. *Woollands v. Crowcher*, Vol. xii. 174.

33. A married woman is, as to property settled to her separate use, a *feme sole* to all intents and purposes, unless restrained by the instrument, and examination is not necessary. Examination is of use, as only passing her equity to a settlement. *Sturgis v. Corp*, Vol. xiii. 190.

34. Wife entitled to rents and profits, according to her appointment, "from time to time;" and for default of appointment, to her for her sole and separate use, contracted, with the approbation of her trustees, for the sale of her interest: performance decreed. *Witts v. Dawkins*, Vol. xii. 501.

35. A married woman may bind her separate property without the assent of her trustees, unless that is rendered necessary by the instrument giving her the power. The Court therefore established an annuity granted by her, though after notice to the purchaser of their dissent, upon evidence that she was a free agent, and understood what she did; but the Court refused costs. *Essex v. Atkins*, Vol. xiv. 542.

36. Probate of the will of a married woman, which is now necessary, though formerly otherwise, limited to her power, by the assent of her husband, with respect to any beneficial interest: not, as to her right,

as executrix of another person, to make an executor, and continue the representation. *Stevens v. Bagwell*, Vol. xv. 139.

37. Bond of a *feme covert*, as a surety enforced against her separate estate, under a settlement to her separate use, with power of appointment by will, or any writing purporting to be her will; and in case she should die in the life of her husband, and without making any will or other disposition, as to the whole or any part, then as to that of which no gift should be so made, to the persons who would be entitled by the statute, if she had died intestate and unmarried. *Heatley v. Thomas*, Vol. xv. 596.

38. Securities obtained from a married woman having property settled to her separate use by a creditor of her husband, who, by suppressing that fact, procured himself to be appointed one of the trustees, his co-trustee not being a party to the transaction, set aside. *Dalbiac v. Dalbiac*, Vol. xvi. 116.

Account of separate property not further back than the husband's death, having lived together. *Ibid.*

39. Married woman permitted to transact as to her separate property; but such transactions must be perfectly fair and open. *Dalbiac v. Dalbiac*, Vol. xvi. 125.

40. Injunction against an ejectment under a deed of appointment, as obtained by a husband from his wife by undue influence, oppression, &c. and an issue directed. *Peele v. —*, Vol. xvi. 157.

41. Decree for payment of a debt by the promissory note of a married woman out of the rents and profits of estates, settled to her separate use for life. *Bullpin v. Clarke*, Vol. xvii. 365.

42. Right of a married woman to dispose of property settled in trust

for her separate use, to be paid into her hands on her receipt, &c. unless restrained to payment not by anticipation. *Brandon v. Robinson*, Vol. xviii. 434.

43. Bequest to a woman for own use held for her separate use. *Adamson v. Armitage*, Vol. xix. 419.

44. *Feme covert* not chargeable with default during coverture. Lord *Montford v. Lord Cadogan*, Vol. xix. 640.

And see ANNUITY, 30.

[D.] WIFE'S RIGHT TO SETTLEMENT.

And see BANKRUPT [T.]

1. Legacy decreed to *feme covert*: settlement directed. *Lillia v. Airey*, 284.

2. Wife examined on commission apart from husband, as to the disposition of money devised to be laid out in land for her in tail, reversion to her in fee, whether to be received in money, or laid out as directed. *Binford v. Bowden*, Vol. i. 512.

3. Husband and wife, by indenture assigned in trust for the husband, personal property bequeathed to the wife and in possession of the administrator: the husband, by will, gave the residue of his real and personal estates in trust for his wife for life, remainder over, and died: upon the bill of the wife and her second husband, the deed was delivered up to be cancelled, on their waiving all benefit under the will. *Wright v. Rutter*, Vol. ii. 673.

4. An action against an executor by a husband for personal property bequeathed to his wife, does not lie. *Ibid.* 676.

5. Devise to the use of *A.* and her issue in strict settlement, subject to a trust for debts and legacies, and to pay annuities out of rents and profits, with power to sell. Upon a bill of creditors and legatees, one

of the annuitants being living, the assignees of A.'s husband, a bankrupt, being defendants, were decreed to make proposals for a provision for the wife. *Oswell v. Probert*, Vol. II. 680.

6. Settlement of the property of a married woman, a ward of the Court, and of all the dividends and interest accrued, directed, in opposition to an assignment by the husband for valuable consideration. *Like v. Beresford*, Vol. III. 506.

7. Bill by husband for stock held in trust for his wife: a claim was set up under a bond by the wife and her former husband, securing an annuity out of the dividends, as an assignment for valuable consideration: but as it came before the Court collaterally, and several objections were taken upon the annuity act, the infancy of the wife, and the nature of her interest at the time, the Master of the Rolls, though upon the general question inclining in favour of the wife's equity against an assignee for valuable consideration, would not determine it; but referred it to the Master to approve a settlement upon the wife and her issue, with liberty to the representative of the obligee to apply. *Franco v. Franco*, Vol. IV. 515.

8. Upon a settlement of the fortune of a ward of the Court, who had married a man of no property, the Court took care to secure a provision for a future marriage. *Wells v. Price*, Vol. V. 391.

9. Settlement directed of a legacy to a married woman claimed by her husband. *Blount v. Bestland*, Vol. V. 515.

10. Upon the bill of a married woman entitled to a share of the personal estate as one of the next of kin of the intestate, against the husband and the administrator, the

latter claiming to retain towards satisfaction of a debt by bond from the husband to him, it was declared he was not entitled to retain: but that the plaintiff's share was subject to a farther provision in favour of her and her children, the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children; regard being had to the extent of her fortune and the settlement already made upon her. *Lady Elibank v. Montolieu*, Vol. V. 737.

11. A provision by marriage settlement in lieu, bar, and satisfaction of all dower or thirds which the wife might otherwise be entitled to out of all the real and personal estate, held to bar her interest in what was not disposed of by the will of her husband. *Druce v. Denison*, Vol. VI. 737.

12. Where defendant, under coverture, became entitled, as next of kin, to a share of personal estate, part of which was three per cent stock, and the administrator transferred it into her name, describing her as the wife of J. W., she subsequently transferred a part, and he signified his assent by signing the transfer, held that the original transfer did not vest the property in the husband; and not having done any act to reduce it into possession, his representative could not claim it. *Quære*, If the Bank could have prevented his transferring it, or the Court interfere to make a provision for her. *Wildman v. Wildman*, Vol. IX. 174.

13. The interest in stock is properly nothing but a right to receive a perpetual annuity, subject to redemption. *Ibid.*

A husband may dispose of or for-

feit his wife's term; but if not, it survives against his representative. *Ibid.* 177.

14. Upon a decree establishing the right of a wife to maintain a suit for a settlement against her husband and the administrator, established; but she died before any thing had been done under the decree, held that she having done nothing to waive her equity, her children were entitled to the benefit of it, and it might be done by supplemental bill. *Seemle*, She cannot waive it so as to bind the interest of her children. *Murray v. Lord Elibank*, Vol. xiii. 1.

15. She has the option of a settlement for her and her children. *Quere*, If she can claim it for herself, but not for her children? Where money is carried to her account in Court, the constant habit is to direct an inquiry if any settlement has been made, and to direct one upon her and her children. *Ibid.* 6.

16. *Quere*, Whether the children have any substantive and independent right to claim a settlement after the death of their mother, if none has been directed during her life? *Ibid.* 7.

17. Upon bill filed, and decree obtained by wife, directing the Master to approve a proper settlement, but she died before any report, held that the children had acquired a right by the judgment in the former suit. *Murray v. Lord Elibank*, Vol. x. 84.

18. *Feme covert* may waive her equity for a provision for herself and children up to the moment of its completion. *Ibid.*

If either party die while it rested merely in proposal, that would not affect the right by survivorship, as between husband and wife. *Ibid.* 91.

19. Husband is entitled to lay hold, where he can, of his wife's property, and the Court will not interfere. So, if a trustee for the wife, before bill filed, may pay over personal estate, or rents and profits, to the husband; but after bill filed, he cannot exercise his discretion upon that. *Ibid.* 90.

20. Money devised to be laid out in land for *feme covert* in tail, with reversion to her in fee, she chose to have it paid to her husband; not allowed, without certificate that there was no settlement. *Binford v. Bowden*, Vol. ii. 38.

21. Wife's estate being settled to her separate use for life, with power of disposition, and a sale was effected by the husband and wife by fine, which appeared to have been made for the benefit of her trustee, Court set aside the sale as to the interests of children in reversion under her appointment, but established it as to her separate estate for life; and directed two wills executed by her, as appointments in favour of the purchaser, delivered up, to be cancelled. *Parker v. White*, Vol. xi. 209.

Children necessary parties to such a bill. *Ibid.* 219.

Wife permitting the husband to receive her separate income from time to time, the Court will only give the account for one year. *Ibid.* 225.

Under a settlement of the wife's estate, the husband and wife are purchasers for the children. *Ibid.* 228. 235.

[E.] RIGHTS OF SURVIVORSHIP.

1. Wife barred from her right to be exonerated out of the assets of her husband in respect of money raised by mortgage of her estate, and received by him, by telling executor she would not raise her claim;

and no difference whether legacies were paid before or after. *Clinton v. Hooper*, Vol. 1. 173.

2. Parol evidence of her declarations admissible, to prove that it was not applied for the husband's use; not to prove the transaction itself different from what it appears to be by the instruments and other evidence, as that it was intended as a gift to him. *Ibid.* 173.

3. General exception of mortgage debts out of charge in a will for debts, not sufficient to put wife to election to take under will, or have mortgage of her estate paid out of assets. *Ibid.* 178.

4. Proof of application of money raised on wife's estate to her use, bars her demand on husband's assets; she does not stand in place of mortgagee. *Ibid.*

Parol evidence admissible to prove application for benefit of the wife or any of her relations. *Ibid.* 184.

5. Heir at law would be barred of his right against personal assets, by declaration proved by parol, that he would not raise his claim, or even after legacies paid, affirming it; and wife's case is the same as that of heir at law. *Ibid.* 185.

Husband having paid part of mortgage upon wife's estate, on which she had joined, may, by his indorsement, charge it again to the same amount, but not *ultra*. *Ibid.*

6. The rule, that a *feme covert* is to be considered as a *feme sole* as to her separate property, does not extend to transactions with her husband. *Ibid.* 498.

7. Husband acquires no interest in it by paying it off. *Ibid.* 186.

8. Wife not to be paid in preference to onerous creditors. *Ibid.* 186.

9. Wife's right not on the contract, but because, being husband's

debt, his personal bound in the first instance. *Ibid.* 186.

10. Not necessary to appear on the instruments that it is the debt of the wife, but may be proved *aliunde*. *Ibid.* 187.

11. Where the debt is not originally the husband's, his covenant to pay is only collateral, and will not make it his: but *quare*, whether so against creditors. *Ibid.* 187.

12. Court will not infer an equitable assumpsit contrary to the tenor of the obligation subsisting between husband and wife. *Ibid.* 188.

13. Where the money was paid to the wife with privity of husband, without writing, so as to appear that she could dispose of it in her life or by will, not to be considered the debt of husband. *Ibid.* 188.

14. *Feme covert* by deed directed rents, &c. her separate property, to be paid during her life to her husband for his own proper use and benefit: the intention being only to give him the administration during coverture without account, after his death the widow is entitled to the future rents, and to those which accrued in his life but not received. If her interest had passed, it must upon the circumstances of the transaction have been set aside. *Milnes v. Busk*, Vol. 11. 488.

15. A claim by the testator's widow to dividends, to which he was entitled under a bankruptcy, as a gift by him to her separate use, failed; the evidence not even affording a sufficient ground for directing an issue. *M'Lean v. Longlands*, Vol. v. 71.

16. Whether an agreement by a husband for a lease of part of his wife's term will bind her after his death, as an actual lease does, and if so, whether the rent is his property, or survives to her with the reversion. *Quere. Druce v. Denison*, Vol. vi. *Ibid.*

17. Husband may forfeit or dispose of his wife's chattel real during her life: if he does not, it survives to her: if he survives, it goes absolutely to him. *Moody v. Matthews*, Vol. vii. 183.

18. Many obligations, which do not survive against the husband after coverture. *Ibid.* 183.

19. Husband and wife living separate under a divorce *a mensâ et thoro* obtained against the wife for adultery, she petitioned that a sum of money belonging to her might be settled to her separate use: he petitioned that it might be paid to him: the Court refused to make any order. *Carr v. Eastbrooke*, Vol. iv. 146.

20. The Court refused to order a provision for a married woman out of dividends and interest, to which she was entitled for life; she refusing to live with her husband, and he willing to receive her. If he had deserted her, that would be a good ground. *Bullock v. Menzies*, Vol. iv. 798.

21. Where the only settlement upon separation was a bond to secure an annuity, which being in arrear, the trustee refused to put the bond in force without an indemnity, upon bills filed, decree made for arrears, but refused as to an appropriation for growing payments. *Cooke v. Wiggins*, Vol. x. 191.

22. After a deed of separation executed, wife does not become to all intents as a *feme sole*, she can neither execute any deed generally, nor has she the power to contract; the contract of marriage cannot be affected by any contract between the parties. *Lord St. John v. Lady St. John*, Vol. xi. 532.

23. Separation only in the spiritual court *propter sevitiam aut adulteriam*, and after reconciliation, the same cause cannot be revived.

Nor will that Court consider conduct previous to such reconciliation: so at law, articles of separation are put an end to by reconciliation. *Ibid.*

24. After articles of separation and subsequent reconciliation, a deed made with a view to provision in case of future separation, and condition, to revive the former articles, and for the wife to take away the children. *Ibid.*

Semble, such deed is invalid, although with the intervention of trustees. *Ibid.*

25. A deed void at law, Court would order to be delivered up, and where the transaction is against policy, it is no objection that the plaintiff was a party to a transaction, which is illegal. *Ibid.*

26. *Feme covert*, living apart from her husband, and holding herself out, and contracting debts, as a *feme sole*, not entitled to summary relief; but left to her plea of coverture. *Watson, ex parte*, Vol. xvi. 266.

27. Proviso in a deed of separation, that the wife surviving shall be entitled to her dower and thirds of all real and personal estates, whereof the husband shall die seised or possessed, construed, not as a covenant to leave her such a portion of the personal estate as she would be entitled to under the statute, had he died intestate, but that she should be in the same situation, as if not separate, as to dower and thirds, *i. e.* the actual share by the law or custom; not interfering therefore with his testamentary disposition. *Cochran v. Graham*, Vol. xix. 63.

[F.] MAINTENANCE.

1. No court has any original jurisdiction to give a wife separate maintenance, but it may be given incidentally, as on a *supplicavit* in Chancery, or a divorce *a mensâ et*

thoro. in the Ecclesiastical Court. *Bell v. Montgomery*, Vol. 1. 195.

2. Where husband executed a bond to trustees for maintenance for his wife on a separation for adultery on her part, and upon her further ill conduct was destroyed, held that she was entitled, like any other *cestui que trust*, for such relief as the destruction of the instrument made necessary. The answer admitting the existence and destruction of the bond, an action would lie on it, as on a lost bond, without *profert*, in the name of the trustee, decree made accordingly. *Seagrave v. Seagrave*, Vol. XIII. 439.

3. A jointure not forfeited by adultery, dower only, by statute 13 Ed. 1. c. 34. So the Court will interfere to enforce performance of marriage articles, though the wife be living in adultery. *Ibid*.

4. Advances to a married woman deserted by her husband, on the credit of a fund in Court, her property, for her maintenance, exceeding the income of that, reimbursed out of the capital. *Guy v. Pearkes*, Vol. XVIII. 196.

5. In the distribution of separate property of a married woman as assets after her death, a bond not entitled to priority. *Anonymous*, Vol. XVIII. 258.

6. No decree for separate maintenance upon the bill of a wife on the mere fact, that she and her husband were separated by consent; he not making any addition to the settlement for her on marriage out of her property. The only instances of it, either out of his property or what was originally hers, are, where he had turned her out of doors, or by ill-treatment obliged her to leave his house; or had quitted the kingdom, leaving her destitute. *Duncan v. Duncan*, Vol. XIX. 394.

[G.] JOINDER IN SUITS, &c.

1. Husband a formal party to a bill against wife in respect of separate estate. *Lillia v. Airey*, Vol. I. 278.

2. Motion by plaintiff for a separate answer by a *feme covert*, because her husband was a prisoner in the King's Bench, refused. *Anonymous*, Vol. II. 332.

3. The course is not to establish a deed between husband and wife on her separate estate without the presence of the wife in Court, where the trustees put the parties to file a bill. *Milnes v. Busk*, Vol. II. 500.

4. An infant plaintiff, a ward of the Court, having married, proceedings staid, till the husband shall appear. *Brummell v. M'Pherson*, Vol. VII. 237.

5. Husband under the circumstances decreed to procure his wife to join in a surrender of copyhold estate. *Stephenson v. Morris*, Vol. VII. 474.

6. Whether under a contract by a husband to sell the estate of his wife the Court will decree him to procure her to join, *Quære*. *Emery v. Wase*, Vol. VIII. 505.

7. A *feme covert* married since the original bills filed cannot be brought into contempt for not answering the amended bill, upon the circumstance of her husband being out of the kingdom, unless there be a previous order upon her to answer separately. *Carleton v. M'Enzie*, Vol. X. 442.

8. Not having put in an answer to a bill by her husband, order made upon her to put it in, instead of an attachment in the first instance. *Ainslie v. Medlecott*, Vol. XIII. 266.

9. Demurrer by a married woman to a bill of discovery of transactions with her as agent to her husband, allowed. *Le Texier v. The Margrave*

of *Anspach*, Vol. v. 322. Affirmed on re-hearing, Vol. xv. 159.

10. Demurrer by a married woman to a bill praying discovery only against her, and relief against her as to contracts, &c. by her, as agent for her husband, alleging the vouchers, &c. to be in her possession: allowed; upon the objection, first, to make a mere agent a party; secondly, to admitting the testimony of a wife in her husband's cause. *Ibid.* Vol. xv. 159.

BASTARD.

1. Under a bequest "to such child or children, if more than one, as it may happen to be *ensient* of by one," a natural child, of which she was then pregnant, cannot take; though a bequest to the natural child, of which a woman was *ensient*, without reference to any person as the father, would probably be good, having no uncertainty. *Earle v. Wilson*, Vol. xvii. 528.

2. Rule, that a bastard cannot take as the issue of a particular person, until it has acquired the reputation of being the child of that person, which cannot be before its birth. *Ibid.* 531.

And see CHILDREN.—MAINTENANCE.—ILLEGITIMATE CHILD.

BERMUDA.

See WILL [A.] 10.

BENEFICE.

See GRANT, 3.

BIDDINGS.

1. Biddings are opened for benefit

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of the suitor and estate; not of purchaser; as where he was late, and the overbidding is so. *Anonymous*, Vol. i. 453.

2. Biddings opened after rep confirmed on circumstances, as with the owner of the estate, who joined in the motion, was at the time confirming in prison, and a fourth the original price was offered in advance, but a deposit of the whole advance was required, increase of price is not alone sufficient, but a large is a strong auxiliary circumstance. *Watson v. Birch*, Vol. ii.

3. Fraud is one exception to general rule, not to open bidding after confirmation of the rep. *Ibid.*

4. On opening biddings the Court in the reference of the costs of purchaser, will not give a particular direction for a specific expense. *Anonymous*, Vol. ii. 286.

5. Biddings opened on advance 100*l.* on 800*l.* and 200*l.* on 1200*l.* *Anonymous*, Vol. ii. 487.

6. Biddings opened on advance of 50*l.* on 380*l.* paying the expense 10*l.* per cent. not sufficient on a sum. *Upton v. Lord Ferrers*, Vol. iv. 700.

7. Biddings opened after the report confirmed simply upon an advance of 61*l.* on 305*l.* 35*l.* not sufficient. *Chetham v. Grurgeon*, Vol. vi. 86.

8. Biddings opened on advance of 200*l.* upon 3200*l.*; but 100*l.* held too little. *Anonymous*, Vol. vi. 148.

9. Biddings opened. *Tait v. I Northwick*, Vol. v. 655.

10. Biddings opened in favour of a person, who was present at sale. *Rigby v. M^cNamara*, Vol. vi. 117.

11. A person, who by opening the biddings has occasioned a great advance, is not liable to pay at a considerable advance, though

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not himself the purchaser, is not entitled to costs. *Rigby v. McNamara*, Vol. vi. 466.

12. Upon opening biddings the Court refused to dispense with a deposit, or to order a trifling one, upon particular circumstances. *Anonymous*, Vol. vi. 513.

13. The rule, that an advance of 10*l.* *per cent.* entitles the party to open biddings, not to prevail in future. *Andrews v. Emerson*, Vol. vii. 420.

14. A person who opened biddings, but was not the purchaser, the estate upon the re-sale going considerably higher, cannot on that ground have his costs. *Earl of Macclesfield v. Blake*, Vol. viii. 214.

15. Where a party opens the biddings not for his own benefit, but for that of all parties concerned, he shall have his costs; such order always to be made upon the special circumstances. *Owen v. Foulks*, Vol. ix. 348.

16. After a purchaser has confirmed his report, biddings will not be opened, unless particular principles arise out of the character of the parties or circumstances of the case. *Morrice v. Bishop of Durham*, Vol. xi. 57.

17. A party who had opened the biddings allowed his expenses as well as to receive back his deposit, having done so at the instance and to the benefit of the family. *West v. Vincent*, Vol. xii. 6.

18. After confirmation of the report, biddings not to be re-opened unless there is some misconduct in the party who has the benefit of that confirmation, mere negligence, surprise, or circumstances of that sort, are not sufficient. *White v. Wilson*, Vol. xiv. 153.

The rule of fixing 10 *per cent.* on opening biddings varied according to circumstances. *Ibid.*

BILLS.

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19. Biddings opened upon a second application by the same person: the purchaser not appearing upon notice. *Preston v. Barker*, Vol. xvi. 140.

BILLS.

And see BANKRUPT [K.] *passim*.—INTEREST [A.] 4. 6.—JURISDICTION, 24.—TIME, 2.

1. A letter undertaking to accept bills held an acceptance. *Ex parte Dyer*, Vol. vi. 9.

2. Order payable out of a particular fund, not a bill of exchange. *Yeates v. Groves*, Vol. i. 281.

3. Creditor by note need not declare upon it, but may recover upon the loan. *Ex parte Mills*, Vol. ii. 303.

4. Bills, in lieu of which other bills are given, if permitted to remain with the holder, and the latter bills are not paid, may be enforced. *Ex parte Barclay*, Vol. vii. 597.

5. Bill of exchange; notice, that a bill is dishonoured, to effect a discharge, must come directly from the holder. *Ibid.* Vol. vii. 597.

6. A party having the security of drawer and acceptor, taking in composition from the latter, cannot come upon the former; so giving time to the acceptor. *Ex parte Wilson*, Vol. xi. 410.

7. A bill accepted, being dishonoured, was taken up for the honour of the drawer, held that he might stand in the place of the drawer, but could have no right against the acceptor without effects. *Ex parte Lambert*, Vol. xiii. 179.

8. Bankruptcy of acceptor does not dispense with notice to the drawer. *Boulton v. Stubbs*, Vol. xviii. 21.

9. Distinction as to indorsed bills remitted to a banker for a special

purpose, and therefore on his bankruptcy remaining the property of the remitter, subject to the lien, whether legal or equitable property. *Ex parte Pease*, Vol. XIX. 36.

10. Distinction between goods in the hands of a factor and bills in the hands of a banker: the latter, if indorsed, may be pledged or discounted, though against the faith of the remittance; and the remitter can be only a general creditor. *Ibid.* 38.

11. Special remittance to a banker, with directions to apply to a particular purpose, however the bill is treated, whether written short, or not, if kept and dealt with, without objection to the instructions, must in general cases be taken subject to them. *Ibid.* 41.

12. Bills, remitted to a banker on the general account, cannot on his bankruptcy be laid hold of by the remitter: if remitted for a particular purpose, they must be so applied. *Ibid.* 44.

13. Distinction between bills and goods in the hands of a factor; who is to sell on account of his principal; but the property is not in him: the property in the bills passing; so that the person, to whom they are remitted, may break his faith, negotiating or pledging them: yet, if not negotiated or pledged, the bills in his hands may be followed, and even the proceeds. *Ibid.*

14. General right to have bills in a banker's hands at his bankruptcy restored. Difficulty upon the distinction (in *Bolton v. Puller*) not admitting that right against another house, with which the customer had not dealt, but composed of some of the firm. *Ibid.*

15. Effect of indorsement, as an authority to discount or negotiate bills. *Ibid.* 49.

16. Paper, not actually applied

under a permission to negotiate discount for limited purposes maintains the property of the remitter. *Ibid.* 58.

17. Effect of indorsement, special or in blank, as an authority to pledge as well as discount. *Ibid.* 59.

18. Bills remitted with power to discount even for general purpose if not discounted, in the event of bankruptcy, remain the property of the remitter. *Ibid.* 60.

19. Immediate notice of a dishonoured bill at an early hour gives preference. *Ex parte Moline*, Vol. XIX. 5216.

20. Notice of a dishonoured bill to a bankrupt, as drawer, before the choice of assignees, good. *Ibid.*

21. Distinction between discount and deposit of bills; depending not on the mere fact of indorsement but on the intention to make an absolute transfer, giving full power to go against all parties on the bill, or merely to enable the person to whom they are deposited to receive the amount from the other party.

Indorsement *prima facie* evidence of the former; unless the object is a mere deposit is clearly shown. *Ex parte Twogood*, Vol. XIX. 229.

BONA VACANTIA.

See FOREIGN STATES, 3.

BOND.

And see AGREEMENT [D.] 7.—CONSIDERATION.—COVENANT, INTEREST, [A.] 5. 11. [B.] JURISDICTION, 2. 11.—VOLUNTARY SETTLEMENT, 6.—PROPERTY.—OBIT SECURITY.—BANKRUPTCY [K.] 45, *et seq.*

1. Bond delivered to a third

son, to be delivered to obligee on performance of condition, takes effect on performance from original sealing and delivery, though obligor and obligee both dead. *Graham v. Graham*, Vol. I. 275.

2. Bond by *feme* delivered to a stranger before her marriage, to be delivered on condition, good, though condition performed after marriage. *Ibid.* 275.

3. Bond not to be tacked to a mortgage against creditors. *Hamerton v. Rogers*, Vol. I. 513.

4. Joint bond considered as joint and several. *Thomas v. Frazer*, Vol. III. 399.

5. Joint bond held several against creditors in the administration of assets. *Burn v. Burn*, Vol. III. 573.

Joint bond held several in bankruptcy. *Ibid.* 575.

6. Bond in consideration of future cohabitation void at law. *Franco v. Bolton*, Vol. III. 371.

7. Bond to secure an annuity to the obligor's mother for life: condition reciting that, by the recommendation of friends, he had been appointed to succeed his father in the command of a government packet, on condition of providing for his mother, &c.: the Master of the Rolls inclined to dismiss the bill against his executrix, but gave plaintiff leave to bring an action. *Hartwell v. Hartwell*, Vol. IV. 811.

8. Bond upon marriage to pay a sum of money to the husband; which, upon certain contingencies to be determined upon his death, was declared to be subject to the trusts of the settlement for his wife and children. Upon his bankruptcy payment was decreed to the assignees. *Studdy v. Tingcombe*, Vol. V. 695.

9. No relief, where the interest goes beyond the penalty of a bond, if occasioned by the delay of the

plaintiff, the obligor. *Pulteney v. Warren*, Vol. VI. 92.

10. Where a party executes a bond, meaning that it should be the joint bond of himself and another, and not that he should become a several obligee, it is his several bond; but he has a right to have it delivered up, as contrary to his intention. *Underhill v. Horwood*, Vol. X. 225.

11. Both in causes and bankruptcy, the Court will rectify a mistake in making it joint, by decreeing in a cause that a new bond should be executed joint and several, and in bankruptcy ordering the proof accordingly. *Ibid.* 227.

12. A bond to marry, or pay a stipulated sum, may be established at law; but where it appeared to be a transaction kept secret from a third person, on account of expectations of a third person, and an engagement to marry at his death, and no mutual obligation, Court, on grounds of policy, granted an injunction from taking out execution on the bond until after the hearing. *Cock v. Richards*, Vol. X. 429.

13. As to the validity of a bond of resignation of a living in favour of a particular person, and not to accept a bishopric (the latter not directed by the will); and whether to be considered upon the principle of marriage brokerage bonds, as against public policy, or as a corrupt transaction, with reference to which the Court would not act, *Quere. Dashwood v. Peyton*, Vol. XV. 27.

14. General bond of resignation of a living bad. *Ibid.* 37.

15. Upon a joint and several bond which was lost, and the principal party out of the jurisdiction of the Court, indemnity was decreed against obligors or persons claiming under them by virtue of the bond, and against such costs, da-

mages, and expenses, as they might be put to by the loss of the bond. *East Ind. Co. v. Boddam*, Vol. ix. 464. And affirmed upon a petition of rehearing. Vol. xiii. 421.

16. The jurisdiction of the Court, in respect to lost bonds, is very ancient, there being no remedy at law, without *proferet*, as well as on account of the difficulty of securing indemnity at law. Vol. xix. 466.

17. A bond given to secure to one creditor the deficiency of a composition, and without communication to the other creditors, is bad in equity, and now equally at law, as against public policy, though formerly otherwise. Bond decreed to be delivered up to be cancelled, with costs. *Jackman v. Mitchell*, Vol. xiii. 581.

18. Such a bond might be good if it were part of the transaction that it should not be kept secret. *Ibid.* 587.

19. Where the annuity bond was forfeited before the insolvency of the grantor, who was discharged under an insolvent act, and the obligor afterwards by compounding relieved the principal from payment, held that he should be allowed the penalty as the debt, being less than the subsequent arrears. *Butcher v. Churchill*, Vol. xiv. 267.

20. In bankruptcy, interest on a bond stops at the date of the commission, unless there is a surplus. *Ibid.* 573.

Quære, As to ascertaining the debt upon an annuity bond, forfeited at the time of an insolvent's discharge under the act?

21. Bond set aside as though not strictly Champerty, yet near it. *Wood v. Downes*, Vol. xviii. 128.

22. The presumption of payment of a bond after twenty years may be repelled by evidence, that the obligor had no opportunity or means

of paying. *Fladong v. Winter*, Vol. xix. 195.

23. Objections to the presumption of payment of a bond: the fluctuations of credit: and the circumstances of the security remaining with the obligee: a circumstance of great weight. *Ibid.* 199.

BOUNDARIES.

See APPORTIONMENT, 1.—LANDLORD AND TENANT, 3.

LORD CLIVE'S BOUNTY.

To entitle the widow of an officer in the East India Company's service to Lord Clive's bounty, the marriage must have taken place before he retired from the service. *M'Kenny v. East India Company*, Vol. iii. 203.

CANCELLING.

See WILL, [C.] 62, 63.

CERTIFICATE OF BANKRUPT.

See BANKRUPT, [N.]

CERTIFICATE OF COURT.

See PRACTICE, [R.]

CHARGE AND DISCHARGE.

1. A general charge of debts and legacies upon all the real estates of the testator not annulled by a subsequent power to sell a particular estate only, and apply the produce to the same purpose: but that estate was first applied. *Core v. Bassett*, Vol. iii. 155.

2. Though the testator has

CHARGE.

charged his real estate with debts in aid of the personal, the personal may be given exempt from the debts by an unattested codicil. *Ibid.*

3. Party discharged, as well as charged, by his own examination. *Blount v. Burrow*, Vol. I. 546.

4. Arrangement of charges as to priority. A power, when executed, takes place according to the original deed creating it. *Mosley v. Mosley*, Vol. V. 248.

5. Charges, upon an estate more than sufficient to answer them, directed to be raised by mortgages of different parts. *Ibid.*

6. An estate having once borne a charge in favour of legatees or creditors is discharged; though the fund is misapplied by the trustees. Vol. V. 736.

See IMPLICATION.—WILL, *passim*.

7. Distinction between legacies charged on the land as an auxiliary fund, and a portion of the land, or its produce, when directed to be sold. An unattested paper has effect in the former case, not in the latter. *Hooper v. Goodwin*, Vol. XVIII. 167.

8. A gross sum to be paid out of the rents and profits: the trustees, if the trust requires payment, not confined to annual profits. *Bootle v. Blundell*, Vol. XIX. 528.

9. Devise for payment of debts by rents and profits, out of the statute of fraudulent devises; but a gross sum for that purpose not limited to annual rents, but to be paid with all convenient speed. Distinction between debts, and legacies, and annuities: but the same provision for all is evidence, although not conclusive, against it. The same inference as to costs, directed to be paid in the same manner, exonerating the fund generally liable in the first instance. Vol. XIX. 528.

CHARITY.

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And see DEVISE, 22. 33. 54. 69. 81. 86.—EXECUTOR, [A.] 29.

CHAMPERTY.

Assignment to navy agents of part of the subject of a prize suit, then depending, void: amounting to champerty, viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it, which is not confined to costs of common law. *Stevens v. Bagwell*, Vol. XV. 139.

CHANCERY.

To rectify mistakes is the peculiar province of the Court of Chancery. *Finch v. Finch*, Vol. I. 545.

CHARITY.

And see DEVISE, 79. 92.—SPECIFIC PERFORMANCE, [B.] 17.—TRUST ESTATE, 6.

1. Stock cannot be appropriated to support a permanent charity, but must be sold. *Isaac v. Gompertz*, Vol. I. 44.

2. Interest under power of appointing the application of a charity not sufficient to sustain a bill. *Attorney General v. City of London*, Vol. I. 243.

3. On information, administration of a charity under an appointment by the trustees, and a plan confirmed by decree, taken from the parties appointed, being subjects of the United States of America, and therefore not now liable to the control of the Court. *Ibid.*

4. On information for charity regulator appearing to have no title, there can be no decree but to dismiss the information; and in that case costs cannot be given out of

the charity. *Attorney General v. Oglander*, Vol. 1. 246.

5. Testator declaring that his debts should come out of the real, not the personal, gave the real to trustees charged with some charitable legacies, and one to each trustee. By codicil he removed one trustee, and revoked his legacy, appointing another with the same legacy: he revoked all the charitable legacies, and gave a less legacy to one of the charities mentioned before, and other new charitable legacies, without specifying any fund, held all to be charged on the real, and therefore void as to the charitable legacies. *Seacroft v. Maynard*, Vol. 1. 279.

6. The only way of administering a charity is under general direction to trustees: in case of misbehaviour there must be a new information: but the Court will not keep the information, and execute under it from time to time. *Attorney General v. Haberdashers' Company*, Vol. 1. 295.

7. The most general gifts for charity executed. *Moggridge v. Thackwell*, Vol. 1. 475.

8. Power to dispose to charities specified survives notwithstanding the death of the person to execute. *Ibid.* 475.

9. Bequest to A. his executors, &c. desiring him to dispose of as he thinks fit in charities, recommending poor clergymen: A. died nine years before testatrix, who had notice executed by the Court, by reference to the Master to settle a plan, having regard to that recommendation. *Moggridge v. Thackwell*, Vol. 1. 464.

10. Where legacy is given only to erect a charity, legatee is a trustee at all events, and can have no pretensions for himself. *Ibid.* 475.

11. Bequest of money to be laid out in land for establishment of

minister of a chapel void under the mortmain act; and not supported by supposing a discretion in the trustees not to lay it out in land, the directions being imperative. *Grieves v. Case*, Vol. 1. 548.

12. Where the general object of the devise is void, to support upon an intention of personal benefit the interest of a devisee, it must be totally separate from that object. *Ibid.* 548.

13. Land settled in trust for maintenance of a charity, with special directions as to part of rents, the land to be let for a certain term, subject to a rent to that extent: at the expiration of the lease the surplus, with its increase, results to the charity under the general trust, not to the heir. *Attorney General v. Tanner*, Vol. 11. 1.

Instruments to be construed upon the whole context. *Ibid.* 7.

14. The controlling power of the Court over charities does not extend to those regulated by charter, unless they have also the management of the revenues, and abuse their trust, which must be made out by evidence, and will not be presumed. *Attorney General v. Foundling Hospital*, Vol. 11. 42.

15. The Foundling Hospital is an institution of this kind; Court therefore refused an injunction to restrain the governors from building round it, no breach of trust being made out, and it not being waste to turn meadow into buildings unless clearly injurious. *Ibid.* 43.

16. Testator gave real and personal in trust, that a commodious and proper house should be taken on lease at such yearly rent as should be agreed on, or otherwise as the trustees should think fit, as a school, and that the children and grandchildren of some relations should be placed there from the

age of 7 to 14, then to be put out apprentices; also that such other children, as the trustees should think fit, should be placed at the same school; and he gave directions as to an inscription, visitation, &c.: this trust is void under the mortmain act as to the general purpose of a permanent charity, but good as to the disposition for the relations to the extent of children and grandchildren of such of the stocks specified, as were in being at the testator's death; and while the school is kept open for them, other children may be educated there. *Blandford v. Thackerell*, Vol. II. 238.

17. In administering a charity, though a particular intention fails, the general intention shall be executed *cy pres*: therefore upon a trust for the vicars of P. provided they should be presented at the recommendation of the trustees, the trustees neglecting to recommend, the Chancellor, the presentation being in the crown, presented: held, the vicar was entitled to the benefit of the trust. *Att. Gen. v. Boulbee*, Vol. II. 380.

18. Presumptions are to be made in favour of a charity. The Court will not execute a trust of a charity in a manner different from that intended, unless it cannot be executed literally, but may in substance by another mode consistent with the general intent; as where the object was to build a church in the parish of A, and the parish would not permit it, it could not be executed elsewhere; but where it was to distribute bread to poor persons attending divine service and chanting the donor's version of the psalms, although the chanting could not take effect, the rest was executed. *Ibid.* 387.

Under a commission of charitable uses, the direction of the founder varied; but persons to whom the

benefit of the charity was appointed for life irregularly according to the decree, were permitted to enjoy. *Ibid.* 389.

19. Where a charity cannot be executed as directed, but the general purpose appears distinct, and may be in substance attained by another mode, it shall be executed *cy pres*: but a personal bequest attached to a void charity, as an endowment, must fall with its principal. *Att. Gen. v. Whitchurch*, Vol. III. 141.

20. The Court will not execute a power given by the testator to trustees to continue his charities, or to give any others they should think fit. *Coxe v. Basset*, Vol. III. 155.

21. In administering a charity, though a particular intention fails, the general intention shall be executed *cy pres*: therefore upon a trust for the vicars of P. provided they should be presented at the recommendation of the trustees, the trustees neglecting to recommend, the Chancellor, the presentation being in the crown, presented: held, the vicar was entitled to the benefit of the trust. *Att. Gen. v. Boulbee*, Vol. III. 220.

22. A college, devisee in remainder after estates for lives, in trust for purposes partly for their own benefit, and very specific with respect to them, held not to have accepted the devise by acts done merely to preserve the fund; and refusing to accept after the death of the tenants for life, the Master was directed to receive a proposal, in order to have it determined, whether it could be executed *cy pres*. *Att. Gen. v. Andrew*, Vol. III. 633.

23. Upon a devise to a good charitable use the heir has no right to the rents and profits accrued before the devise is carried into effect. *Att. Gen. v. Bowyer*, Vol. III. 714.

24. The general charitable purpose of the testator shall be executed

upon the doctrine of *cy pres*, though the particular purpose fails. *Ibid.*

25. An account decreed, and a receiver appointed upon the laches of the heirs, substituted by decree as trustees to execute a devise to a charity. *Ibid.*

26. The jurisdiction of the Court of Chancery upon informations for establishing charities arose since the reign of Elizabeth. *Ibid.* 726.

27. Bequest to the society for increasing clergymen's livings in England and Wales for the perpetual purpose of increasing their livings: the governors of Q. Anne's Bounty alone answer the description; and as all their funds are laid out in land, the bequest is void by the statute of mortmain. *Middleton v. Clitherow*, Vol. III. 734.

28. Devise in 1719 to charitable purposes, limiting the same, there not being objects sufficient to exhaust the whole rents, according to the directions of the will, and the whole appropriated to the charities specified, the surplus was applied to increase them against the claim of the heir. *Attorney General v. Minshull*, Vol. IV. 11.

29. The doctrine of *cy pres*, formerly pushed to an extravagant length, is now much restrained. *Ibid.*

30. Charitable legacy secured by mortgage is void by 9 G. 2, c. 36. *White v. Evans*, Vol. IV. 21.

31. So, bequest of money to enable a trustee of a charity to complete a contract for the purchase of land. *Corbyn v. French*, Vol. IV. 431.

32. So, mortgage of turnpike tolls is within the statute. *Knapp v. Williams*, Vol. IV. 430, n.

33. A legacy therefore to the trustees of a chapel for protestant dissenters to be applied by them towards the discharge of a mortgage on the said chapel, held void

under the statute. The mortgage having been paid off by other funds, in the testator's life, the Court would not say the legacy might not have been applied in repairing or sustaining the chapel, but was of opinion it could not be applied to any other charitable purpose. *Ibid.* 418.

34. Bequest for the improvement of the city of B. construed to mean such as are carried on under act of parliament, and not by private persons. *Howse v. Chapman*, Vol. IV. 542.

35. Specific bequest, in trust to sell, and in the first place to pay debts, legacies, &c. and in the next to appropriate the residue to the improvement of the city of B. is void under 9 G. 2. c. 36, as to a navigation share, which being real estate, goes to the heir; and as to money on real securities, which go to the next of kin; the general residue undisposed of was applied first to the debts and other charges, and the deficiency was borne by the trust property, that passed to the city of Bath, and that, of which the disposition failed by the statute, *pro rata*. *Howse v. Chapman*, Vol. IV. 542.

36. A leasehold house, the bequest of which being to a charity fails, passes under a general disposition of the residue, and does not belong to the next of kin as undisposed of. *Shanley v. Baker*, Vol. IV. 732.

37. Under a devise for founding a new college in the university of Cambridge, to be called Downing College, the crown having at length granted the application for a charter and licence, and the university waving the account against the heir at law, who had been substituted as the trustee, farther back than six years, the Lord Chancellor, doubting his authority to confine it, made

the decree accordingly upon the terms of their taking an act of parliament to confirm it. A commission was directed to distinguish lands intermixed with those devised to the charity, and a receiver appointed. *The Attorney General v. Bowyer*, Vol. v. 300.

38. Trust by will for building or purchasing a chapel, where it may appear to the executors to be most wanted: if any overplus, to go towards the support of a faithful gospel minister, not exceeding 20*l.* a year; and if any farther surplus, for such charitable uses as the executors should think proper. The whole trust void, not only as to the real estate and a mortgage, but also as to the personal estate; and the real estate went to the heir at law, and the personal to the next of kin. *Chapman v. Brown*, Vol. vi. 404.

39. A long lease of a charity estate in 1715 at a great under-value, decreed to be delivered up; and an account directed with just allowances. *Attorney General v. Green*, Vol. vi. 452.

40. Upon a rehearing of that part of the decree, which relates to the charity, the decree was affirmed; the Lord Chancellor collecting the result of the authorities, that, where there is a general, indefinite purpose, not fixing itself upon any object, the disposition is in the King by sign manual; but, where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust. The costs of all parties were given out of the fund as between attorney and client. *Moggridge v. Thackwell*, Vol. vii. 36.

41. Formerly a portion of the residue of every man's estate was applied in charity by the ordinary. *Ibid.* 69.

42. If the general substantial intention of a will is charity, the failure of the particular mode shall not defeat it; but the law will substitute another mode. *Ibid.* 69.

43. A compromise, applying part of the fund to an establishment at St. John's College, Oxford, with which the Merchant Taylors' Company are connected, and giving the rest to the next of kin, was, the Attorney General consenting, established by decree. *Andrew v. The Master and Wardens of the Merchant Taylors' Company*, Vol. vii. 223. See the *Attorney General v. Andrew*, Vol. iii. 633, *supra* pl. 22.

44. Bequest in trust for the poor inhabitants of several parishes, to be applied at times and in proportions, and either in money, provision, physic, or clothes, as the trustees think fit. The fund being very considerable in proportion to the objects, the application was upon the principle of *cy pres* extended for the benefit of the same objects to purposes not expressly pointed out by the will; instruction and apprenticing of children, against the claim of the next of kin. *The Bishop of Hereford v. Adams*, Vol. vii. 324.

45. An increase of the revenues of a charity applied for the benefit of the charity. *Ex parte Jortin*, Vol. vii. 340.

46. Bequest to poor relations sustained as a charity. *White v. White*, Vol. vii. 423.

47. In charity cases the Court often gives the relators costs beyond the taxed costs. *Ibid.* 425.

48. Residuary bequest for the purpose of educating and bringing up poor children in the Roman catholic faith void. The fund does not go to the next of kin; but is in the disposition of the crown to some other charitable use by sign manual. *Cary v. Abbot*, Vol. vii. 490.

49. Bequest for rebuilding, repairing, altering, or adding to and improving alms-houses, is valid to the extent of any application upon the land already in mortmain; not of the addition of other land. *Attorney General v. Parsons*, Vol. viii. 186.

50. Bequest to "erect" a charitable foundation imports, that land is to be bought, unless the will manifests a purpose that it is to be otherwise procured. Vol. viii. 191.

51. The Court refused to act under an award in a charity cause, without the consent of the Attorney General, or a reference to the Master to see if it was for the benefit of the charity. *Attorney General v. Hewitt*, Vol. ix. 232.

On a reference in a charity cause, the Court directed the referee to be called by his name, and not arbitrator. *Ibid.*

52. Bequest to dispose of the ultimate residue to such objects of benevolence and liberality as the trustee shall, in his own discretion, most approve of, held a trust for the next of kin, and not a charitable legacy. Where there is a clear trust, but for uncertain objects, the property, which is the subject of such trust, is undisposed of, and the trust results to those to whom the law gives the ownership, on default of disposition by the former owner. *Morrice v. Bishop of Durham*, Vol. ix. 399.

53. Where a charitable purpose is expressed, however general the bequest, shall not fail on account of uncertainty of the object; but the particular application will be directed by the king in some cases, and in others by this Court. *Ibid.* 405.

Signification of the word charity in this Court is derived chiefly from 43 El. c. 4. *Ibid.*

54. Bequest of money to build alms-houses, purchase the ground, &c. with a residuary bequest to the London Orphan School, if they would furnish the ground for the alms-houses, and take the management, &c. but the effect being that without that, they were to take no part of the residue, and it did not appear that they had already lands in mortmain, nor were any such specific lands pointed out; held that the legacy, as well as residuary bequest, were void under the statute of mortmain; and as it could not be distinguished how much was intended for the alms-houses, and how much for the school, the whole must fail. *Attorney General v. Davies*, Vol. ix. 535.

55. Where part of the personal estate consisted of monies lent upon security of poor-rates and county-rates, held that it was within the 9 G. 2. c. 36, as savouring of the realty, and would not therefore pass under a charitable bequest; and though part was raised out of personal property, yet being so blended that it was impossible to distinguish it, the whole must fail. *Finch v. Squire*, Vol. x. 41.

56. Bequest to a trustee for such objects of liberality and benevolence as he, in his own discretion, shall most approve; not supported as a charitable legacy, but a trustee for the next of kin. *Morrice v. Bishop of Durham*, Vol. x. 522.

Charitable disposition connected in every part, wholly disappointed if had in part, as in the instance of a bequest to educate children, if one part of the purpose is first to build a school. *Ibid.* 534. 538.

57. If testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fail, the next of kin take; but when

the person taking is to have it entirely in his own power and discretion to make the application or not, it is absolutely given. *Ibid.* 535.

58. Before words of request or recommendation raise a trust, it must be shown that the object and the subject are certain. *Ibid.*

No case has yet been decided in which the Court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general. In such cases, the application, either by the trustees or the crown, must be to purposes analogous to those described in the 43 Eliz. c. 4. *Ibid.* 540.

59. An alienation for 99 years of a charity estate, by a mere husbandry lease, and without consideration to be shown by those who make and take the lease, to point out that it is a proper bargain, with reference to a husbandlike manner of acting, is a lease, which the Court will not permit to stand. But under the circumstances of long possession, that the defendant was the representative of the original lessee, the lease was set aside without costs, on condition of giving up the lease without trouble, and a declaration that in future such leases will not be so treated. *Attorney General v. Owen*, Vol. x. 555.

60. Where the heir of the founder being lunatic, his committee acting as visitor, had generally constituted himself one of the governors, who were trustees, acting in the receipt of rents, &c. had filled up the other vacancies with persons under his influence, and grossly abused the purposes of the charity; held that the Court clearly had jurisdiction even if the corporation had been

full, there being no visitor capable of acting: but the course should be by petition to remove the existing Governor and Master who had been irregularly appointed. The Court, however, retained the information, and directed an inquiry and account as to the leases of the charity estates, the general account to be confined to the time of the information being filed; with costs. *Attorney General v. Dixie*, Vol. XIII. 519.

61. Where leases had been granted in violation of the express directions of the donor, the Court directed, in order not to disturb under leases, nor to deprive the charity of the benefit of them, that such estate and interest as the representatives of the original lessees had, should, by assignment, be vested in the trustees, and all instruments be delivered up. Court reluctantly made it without costs, intimating that hereafter they would not be refused in any case of information filed. *Attorney General v. Griffith*, Vol. XIII. 565.

62. Where the right of election of a schoolmaster was in the curate, churchwardens, with six of the chief inhabitants, and they made two elections, owing to the difficulty of discovering who were the chief inhabitants at the date of the foundation, or the heir of the survivor, it was referred to the Attorney-general to consider and report as to the proper mode of future elections, which should be most conducive to the interest and benefit of the objects of the charity, and the furtherance of the intention of the donors thereof. *Attorney-General v. Black*, Vol. XI. 191.

63. Court refused to change the petition of a charity, converting a grammar into a commercial school.

Attorney-General v. Whiteley, Vol. xi. 241.

Where the original decree referring it to the Master to consider a plan, omitted to declare the nature of the charity, the Court, upon farther directions, corrected the omission without a rehearing. *Ibid.*

Though the information prays a wrong relief, the Court will give a proper one. *Ibid.* 247.

Principle of *cy pres*, where the original intent cannot be followed. *Ibid.* 251.

64. Upon a general objection, that the tenements of lands charged with an annual payment, but the particular parties were liable not named, the Court directed the previous inquiry, whether the charge could be proved to be issuing out of the lands in question. *Attorney-General v. Jackson*, Vol. xi. 365.

65. Upon a bill for equitable relief as to a rent-charge, all the persons whose estates are liable must be before the Court. There may be cases when the rule is dispensed with, arising from circumstances rendering the sale impracticable or highly inconvenient. *Ibid.* 367.

In charities, the Court holds out relief under circumstances which it would not in the case of individuals. *Ibid.*

So in relieving against want of form and mistakes in pleading as to charities. *Ibid.* 372.

66. Where, upon the construction of a deed of purchase of a rectory, the nomination of the curate had been decreed to be in the parishioners and inhabitants paying to church and poor, it appeared that the trustees had acted in the election according to posterior usage to such decree, the Court declined to make prospective direction, and dismissed the information, except as to the keeping up the number of

trustees, and that which was strictly the proper subject of the information, viz. the stipend of the curate. The right of nomination, as between the trustees and the parties claiming right to nominate, was strictly the subject of a private suit. *Attorney-General v. Newcombe*, Vol. xiv. 1.

67. Where the record shewed that it was intended to be in the nature of an information by relators on the behalf of themselves and all the other parishioners, but as a bill stating it to be only the persons themselves, the Court held it was so clearly a clerical error, as to permit an amendment, if any material difference arose upon it. *Ibid.*

68. So where an advowson was given in trust for such fit clerk as the inhabitants and parishioners; or the major part of the chiefest and discreetest of them should nominate, held that the right of election was in those persons being inhabitants and parishioners of the age of twenty-one, and paying to church and poor. *Fearon v. Webb*, Vol. xiv. 13.

69. Upon a bill against a charity to enforce a claim of perpetual renewal of leases for twenty-one years upon the ground of usage, sanctioned by former decrees and expenditure in confidence thereof, Court dismissed the bill, the claim being inconsistent with the custom of the country, the powers of the trustees of a charity, nor according to the true construction of those decrees.

Semble, A distinct covenant by the hospital to that effect would have been of no validity. *Watson v. Master, &c. of Hemsworth Hospital*, Vol. xiv. 324.

70. After several conditional legacies, with remainders as afterwards specified, a residuary claim of "all the remainders of my different bequests" to trustees for charitable purposes, and any thing not spe-

cified, I commit to the discretion of my executors; held void as to real estate by the statute, and that the latter words passed the general residue to the charity, and not to the executors. *Pain v. Archbishop of Canterbury*, Vol. xiv. 364.

71. A Protestant dissenting chapel may be the subject of an information at the suit of the Attorney-General, as a charitable institution. *Attorney-General v. Fowler*, Vol. xv. 85.

72. Charitable bequest before the statute 9 Geo. 2. c. 36. to the congregation of Presbyterians to which the testator belonged, for placing out apprentices two poor boys of such as were members of the said congregation, and living in the parish of St. Martin in New Sarum.

1st. The fund being considerably more than sufficient, the surplus was applied, upon the principle of *cy pres*, to place out sons of members of the congregation within that parish:

2dly, Such boys in other parishes:

3dly, Daughters of members of the congregation, in the same manner:

4thly, Sons of Presbyterians generally; previously to building a school, or other purposes.

A proposal in favour of sons of persons within the parish, of the established religion, was rejected. *Attorney-General v. Wansay*, Vol. xv. 231.

73. No general appointment of visitor, excluding a commission of charitable uses under the statute 43 Eliz. c. 4. from special powers, that would fall within the general visitatorial power; as powers to the ordinary to interpret and determine doubts upon the statutes; of amotion and punishment, and of appointment, to the ordinary, and to the dean and chapter of York in

certain cases, &c.; the whole visitatorial power, particularly as to the administration of the landed property, not being intended to be given to the ordinary as visitor. *Ex parte Kirkby Ravensworth Hospital*, Vol. xv. 305.

74. Objection to the decree under a commission of charitable uses, as having issued in a case not warranted by the statute 43 Eliz. c. 4. may be in the form of exceptions. *Ibid.*

75. Authorities for extending that act to cases where the governors or visitors are the trustees, or are abusing their powers, though an information would lie. *Ibid.*

76. Power clearly given to interpret and determine doubts upon the statutes, may itself constitute visitatorial power. *Ibid.*

77. Trust by will to pay the income to the testator's wife for life, enjoining her to co-operate with his trustees in carrying his wishes into execution, and directing her, with the advice and assistance of his trustees, to lay out one moiety in promoting charitable purposes, as well of a public as of a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, as his wife shall judge most worthy and deserving objects, giving a preference always to poor relations. The object is charity in general, with a preference, but not confined to poor relations: the distribution to be at the discretion of the wife, with the advice and assistance, not subject to the controul, of the trustees. *Waldo v. Caley*, Vol. xvi. 206.

78. Legacy to be laid out in land in Scotland for a charity, established, not being within the statute. *Mackintosh v. Townsend*, Vol. xvi. 330.

79. Lease of charity land for

eighty years, supported as to the interest of a sub-lessee, upon a fair consideration; several years ago, and no notice, except that it was a charity estate.

As to the original lease under the circumstances, the length of time, the surrender of a former lease, the terms of which did not appear, the rent reserved, and an expenditure, though not according to the covenant, equally beneficial, inquiries were directed to ascertain whether the lease was reasonable or unreasonable in such a degree, that fraud could be inferred. *Attorney-General v. Backhouse*, Vol. xvii. 283.

80. A lease of charity land for ninety-nine years, as a mere husbandry lease, upon terms, and at a rent, adapted to a lease for twenty-one years not allowed, nor a building lease for nine hundred and ninety-nine years, upon an expenditure, commensurate to a term of ninety-nine years. *Ibid.* 291.

81. Devise to A. and his heirs, with a direction, that yearly he and his heirs shall for ever divide and distribute, according to his and their discretion, amongst the testators, poor kinsmen and kinswomen, and amongst their offspring and issue, dwelling within the county of B. 20l. by the year. This is in the nature of a charitable bequest; and the will being made in 1581, was sustained, and inquiries directed as to the poor relations dwelling within the county of B. *Attorney-General v. Price*, Vol. xvii. 371.

82. Devise of real and personal estate in trust for debts and legacies void under the statute (9 Geo. 2. c. 36.) as a charge of charity, legacies upon the real and leasehold estates, and money on mortgage, but on a deficiency of assets, the other legatees preferred to the heir. *Currie v. Pye*, Vol. xvii. 462.

In a charity cause, costs as between attorney and client, to the heir, making no improper point. *Ibid.*

83. Lease of a charity estate set aside for undervalue; if considerable, an under-lease, at a fine, not conclusive; part being ascribed to the goodwill of a trade established, and repairs. Inquiry directed, whether the rent was fair and adequate, distinguishing how much of the premium on the under-lease resulted from the goodwill and repairs, and how much from the value of the lease above the rent reserved to the charity. *Attorney-General v. Magwood*, Vol. xviii. 315.

84. The proper relief given upon an information for a charity, without a specific prayer. *Attorney-General v. Brooks*, Vol. xviii. 319.

85. Trustee for a charity cannot, without an adequate consideration, let for ninety-nine years, not being the ordinary course of provident management, much less with covenant for perpetual renewal, without an equivalent for the inheritance. *Ibid.* 326.

86. Leases of charity estates for twenty-one years, the lessors being not mere trustees, but having also a beneficial interest, set aside as breaches of trust by undervalue. *Attorney-General v. Wilson*, Vol. xviii. 518.

87. Information for the regulation of Harrow School, dismissed as to the removal of governors unduly elected, according to the founder's statutes, not being inhabitants; the Court of Chancery having no jurisdiction with regard to either the election or a motion of corporators of any description; eleemosynary corporations being the subject of visitatorial jurisdiction; therefore, in the case of the Crown becoming visitor, for want of an heir of the

founder, the removal of a corporator, *de facto*, to be sought by petition to the great seal, not by bill or information.

As to the effect of the time during which the defendants had held their offices, against an inquiry into their original eligibility, *Quere*.

As to the revenues, including the management of the estates, and the application of the income, inquiries directed to ascertain whether the estates are properly and advantageously managed; with a view to prospective regulations; and a lease to one of the governors, though without fraud, set aside upon general principles, as inconsistent with his duty; charging him with the full value, if exceeding the rent reserved.

The application of the income to purposes partly specified by the founder's rules, and partly left to discretion, not being in all respects agreeable to the founder's directions, though with no improper motives, to be ascertained by a scheme, having regard on the one hand to the founder's directions, on the other to the alteration of circumstances, which might render a literal adherence to them adverse to their general object and spirit.

An alteration in the constitution of the school, with the view of reducing it to a mere parochial school, by restraining the number of foreigners, *i. e.* boys not on the foundation, refused: the admission of foreigners, without prejudice to the children of the poor inhabitants, being expressly directed; and the small resort of the latter not proved the result of abuse. No objection to encourage attention to parish scholars, by an allowance to the master for each. The expenditure not to be measured by the number of parish boys who are to be immediately benefited by it, if fairly re-

ferable to the purposes of the school. A considerable allowance, therefore, to the master, towards repairs, and a considerable expenditure in enlarging and improving his house, for the accommodation of boarders, considered, upon the whole, not extravagant, as a benefit from the increased revenue in that shape, instead of an increased salary; nor improper, with reference to the general advantage of the school.

The course of education and internal discipline left to the governors and masters; the governors being expressly authorized to alter the founder's rules. Alterations long known and acquiesced in, presumed to have been by their authority, though the precise order does not appear. Any substantial deviation from the principle and purpose of the institution, the subject of visitatorial interposition. *The Attorney-General v. the Earl of Clarendon*, Vol. xvii. 491.

88. Governors of an eleemosynary corporation, even where their election might be said to be a fraud, not removed without a petition to the Lord Chancellor, in his visitatorial capacity; but corporations, constituted trustees, have sometimes been by decree divested of their trust for an abuse of it, as any other trustees. *Ibid.* 499.

89. Decree on information, correcting deviations from the founder's will, of a charity school, by separating the school from the master's house, taking foreign pupils, so as to deprive the poor children from the master's attention, &c. and applying the surplus revenue beyond the maintenance of the existing objects arisen since the founder's death, *cy pres*, to the same uses, comprehending every object, the poor children, the master's salary, and the almspeople. *Attorney-General v. Cooper's Company*, Vol. xix. 187.

90. Regulation of charities by petition under statute 52 Geo. 3. c. 101. *Ibid.* 189.

91. Charitable fund exhausted by the declared object of the founder: a subsequent surplus from the improved annual value applied *cy pres* by the Court, with that view reserving farther directions. *Ibid.* 189.

92. Failure of duty from misunderstanding not a ground of removal. *Ibid.* 192.

93. The Court, regulating a charity, acts without complaint, if there is cause for it. *Ibid.* 194.

94. Decree establishing a charity in Scotland. *Att. Gen. v. Lepine*, Vol. XIX. 309.

95. Testator directs the residue of his effects to be divided for certain charitable purposes, named by him, "and other charitable purposes as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." Codicil naming no other purpose. A bequest to charity, to be executed by the Court, having regard particularly to the objects specified. *Mills v. Farmer*, Vol. XIX. 483.

96. Privileged testaments: for charity, one species, construed otherwise than wills generally. Thus a charge for a charity in a paper, not found, established: so, if found cancelled, presumed unadvisedly. *Ibid.* 485.

97. Although the mode in which a legacy is to take effect is in many cases of the substance, where charity is the object, that is the substance; and the Court provides a mode, not provided for any other legatee; as where the person to appoint dies without appointing; where the mode is illegal, as to a superstitious use, as in the case of the Jewish synagogue, &c. *Ibid.* 486.

98. Distinction between legacy to

charity and to an ordinary legatee; who must be sufficiently described and pointed out. *Ibid.* 487.

99. Bequest to such charitable uses as testator shall by codicil, &c. direct: if he leaves no direction, this Court disposes to such charitable uses as it thinks fit. *Ibid.* 487.

100. Favourable construction of a charitable bequest. *Ibid.* 487.

101. From the word "divided" in a charitable bequest no necessary inference of equality. *Ibid.* 490.

102. Bequest to such charitable purposes as the testator shall name answered by naming one. *Ibid.* 490.

103. Devise of a house for purpose of keeping Bibles and other religious books, and of residue, to purchase such books for the use of the Welch charity schools, as long as the same should continue; held void as to the house, but good as to the latter purpose, it not being necessarily to be executed in that house; referred therefore to propose a scheme, regard being had to the species of charity contemplated by testatrix, but restrained, so as to make it conformable with the establishments of the country. *Attorney-General v. Stepney*, Vol. X. 22.

CHESTER.

Chester not having been within the province of York at the time of Henry 8. is not within the custom. *Pickering v. Lord Stamford*, Vol. III. 338.

CHILDREN.

And see BASTARD.—GRANDCHILDREN.—ISSUE.—LEGACY, [K.] *passim*.—ILLEGITIMATE CHILD.—MARRIAGE SETTLEMENT, *passim*.

1. Under a devise to all the chil-

dren of A. except B. a posthumous child is entitled. *Clarke v. Blake*, Vol. II. 673.

2. Grandchildren entitled under the description of "children" in a will, the intention upon the whole clause being children, or the issue of those who should be dead. *Royle v. Hamilton*, Vol. IV. 437.

3. Grandchildren may take under the description of "children," if there can be no other construction, not otherwise. *Reeves v. Brymer*, Vol. IV. 692.

4. Every word of a will must have a meaning imputed to it, if capable of it without a violation of the general intent or any other provision in the will. *Ibid.* 698.

5. An illegitimate child not entitled to share under a devise to children generally; notwithstanding a strong implication upon the will in favour of that child. *Cartwright v. Vawdry*, Vol. V. 530.

6. The word "children," legally construed, is confined to legitimate children. *Bell v. Phyn*, Vol. VII. 458.

7. Under a bequest to the children of testator's deceased brothers and sister to take *per stirpes*, held that grandchildren were not entitled, and the construction not altered by testator's knowledge of the circumstances of the family. *Radcliffe v. Buckley*, Vol. X. 195.

The only cases where "children" may mean grandchildren are, 1st, Of necessity, as where there can be no other construction; 2dly, Where testator has clearly shown by other words that he does not use the word "children" in the proper, but in the more extended signification. *Ibid.* 201.

8. Legacies to all the children of the testator's sister, of 2,000*l.* each, payable at twenty-one, or marriage of daughters; and until

the shares become payable, the interest, &c. thereof respectively to be paid to his sister for her separate use; a fund to be set apart for paying the legacies to his said sister's children, as they become due: and in case she shall die before all her sons shall attain twenty-one, or before all her daughters attain that age, or marry, the interest, &c. of the legacies for such sons and daughters as shall be under age, or unmarried, to be applied towards their education, &c. All children, including those born after the testator's death, entitled; and an inquiry was directed, what would be a proper sum to be set apart to answer the legacies to future children. *Defflis v. Goldschmidt*, Vol. XIX. 566.

9. The difficulty, or even impossibility of providing a security directed for legacies to children, is not a reason for excluding any children, to whom legacies are expressly given. *Ibid.* 569.

10. Limitation to a child *en ventre*. *Moody v. Walters*, Vol. XVI. 296.

11. Natural child cannot take by a prospective bequest made before his birth. *Arnold v. Preston*, Vol. XVIII. 288.

CHOSE IN ACTION.

Choses in action, *viz.* stock, debts, &c. are not liable to creditors: they cannot be taken on a *levari facias*; and cannot be touched in equity. *Dundas v. Dutens*, Vol. I. 196.

CHURCHWARDENS.

Bill by a former churchwarden against the parish officers, trustees for an estate for the poor of the parish, and forty inhabitants, to be

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reimbursed money laid out on account of the trust under an order of vestry, his accounts being passed, and an order made for payment. Upon demurrer the Lord Chancellor expressed a strong opinion against such a bill; and, as it appeared not to be signed by counsel, ordered it to be taken off the file, and the plaintiff to pay the costs. *French v. Dear*, Vol. v. 547.

See LEASE, 10.

CODICIL.

See WILL, [A.] 13, *et seq.* [B.] 22.

COLLEGE.

See VISITOR.

COMMISSION IN A CAUSE.

1. The execution of the commission in a cause is the act of the Court, carried on by its ministers. *Cooth v. Jackson*, Vol. vi. 30.

2. Upon a debt by bond, payable in London, the commission, or expense of remitting the money, to be paid by the debtor. *Cash v. Kennion*, Vol. xi. 374.

COMMISSION TO EXAMINE WITNESSES.

See PRACTICE, [F.] 15, *et seq.*

COMMISSION OF BANKRUPT.

See BANKRUPT, [F.]

COMMISSIONERS OF BANKRUPT.

See BANKRUPT, [G.]

COMPOSITION.

COMMITMENT.

1. No commitment on a foreign affidavit; as perjury cannot be assigned. *Musgrave v. Meden*, Vol. xix. 652.

And see PRACTICE.

2. The Lord Chancellor declared, that in future, if he should receive a private letter on the subject of a cause, he would consider, whether the writer should not be committed. Vol. viii. 467.

COMPENSATION.

1. The Court will decree a specific chattel to be delivered up without measuring the value, where, from its nature, there can be no compensation by damages. In this instance the defendant retained possession after the expiration of a limited time, for which he had received it upon a special trust and engagement to restore; and an action which had been brought was rendered ineffectual by the release of two of the owners combining with the defendant. *Fells v. Read*, Vol. iii. 70.

COMPOSITION.

And see FRAUD, 16. 26.

1. Upon a composition, a private agreement by some creditors for additional security, though for no greater sum, void. *Ex parte Sadler*, Vol. xv. 52.

2. Creditors bound by acting under a composition as if they had signed. *Ibid.*

3. Though an agreement for a composition, generally, is not binding on the creditor, unless absolutely and strictly fulfilled, a bond-creditor, having concurred in a general resolution for a composition, to be

CONDITION.

secured by notes, was under the circumstances, with reference to the interest of the other creditors, restrained from taking execution in an action upon the bond, on non-payment of the notes, beyond the terms of the composition. *Mackenzie v. Mackenzie*, Vol. xvi. 372.

CONDITION.

And see LEGACY, [B.]

1. Words of restraint, unless there is a provision for the consequence of violation, operate only as recommendation. *Pigott v. Bullock*, Vol. i. 483.
2. A condition inconsistent with the gift is void; therefore upon a bequest to A. for life; and at his decease to his heirs, executors, &c. but if he attempts to dispose of the principal, over, he takes the absolute interest; and the condition being inconsistent with it is void. *Bradley v. Peixoto*, Vol. iii. 324.
3. Condition, that tenant in fee shall not alien, or that tenant in tail shall not suffer a recovery, is void. *Ibid.* 325.
4. Devise on condition of paying 500*l.* in six months upon trust to pay the interest to the devisor's wife for life; and after her death the principal according to her appointment in writing, with witnesses, whether sole or married, provided she shall release her dower within six months; and in case of her marriage without consent of the trustees one moiety to go over: the wife, who took other interests under the will, died within the six months, not having married, nor released dower. The 500*l.* did not vest in her. *Croft v. Slee*, Vol. iv. 60.
5. Promissory note to pay, when the circumstances of the drawer will

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admit without detriment to himself or family, creates no debt. *Ex parte Tootell*, Vol. iv. 372.

6. Where an annuity was bequeathed, with a condition in the most general terms for its falling into the residue, in case the party should at any time sign or execute any instrument contracting for the sale, assignment, charge, or disposal, &c. or empowering to receive any part of such annuity, held, that signing the petition and schedule in order to take the benefit of the insolvent act was a breach of the condition. *Shee v. Hale*, Vol. xiii. 404.

7. A legacy to a daughter to be paid at 21, or her marriage, provided she should marry with consent of the executors; held, that by her marriage under 21, without consent of the only surviving executor, who was abroad, her title to the legacy was reduced to the single contingency of her attaining 21. *Knight v. Cameron*, Vol. xiv. 389.

8. Legacy in trust to pay the interest to the separate use of A. for life; and, after her decease, as to the capital for her children: if no child, to pay the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons.

Though the husband, having died during his wife's life, never became entitled to the interest, the limitation over was established; as distinguished from the case of express condition. *Pearsall v. Simpson*, Vol. xv. 29.

9. Bequest of residue, in trust, in case A. shall within six months after the testator's decease give security not to marry B. then, and not otherwise, to pay to the children



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of A.; with a proviso to go over, if she shall refuse or neglect to give such security.

A condition precedent. The six months are exclusive of the day of the testator's death: therefore, as he died on the 12th of January, between eight and nine in the evening, a security given on the 12th of July, about nine in the evening, was held sufficient. *Lester v. Garland*, Vol. xv. 248.

10. Relief against breach of condition arising, not from the fault or negligence of the party, but the act of the trustees: whether at law, *Quære*. *Clarke v. Parker*, Vol. xix. 17.

11. Though there can be but one true legal construction of a condition, a court of law cannot hold a condition to be performed in all.

Circumstances, in which a Court of equity will relieve against the non-performance. *Ibid.* 22.

CONFIRMATION.

1. Purchase and repurchase of a legacy expectant on a death: the whole transaction set aside for fraud; and not confirmed by a subsequent bond, and payment of interest for four years, because given under an idea, that obligor was bound by the former transaction: all the deeds set aside, and account decreed. *Crowe v. Ballard*, Vol. i. 215.

2. Bond given at full age, and not in distress, but under a notion of honour, will, if attended with money actually advanced, maintain a former bargain, however disadvantageous: but is no confirmation, wherever it is not given freely, as if under distress, or terror, or apprehension from the original transaction, though unfounded. *Ibid.* 220.

And see CONTRACT, 23.

CONSIDERATION.

CONFUSION.

Case by the old law of a wilful mixture of corn or flour by the owner, with that of another; the value being unequal, and therefore not to be distinguished, the other took the whole. *Lupton v. White*, Vol. xv. 442.

CONSIDERATION.

See VOLUNTARY SETTLEMENT, 2, 14.—CONTRACT, 25.

1. Voluntary bond during cohabitation to a woman previously of a very loose life: soon afterwards another bond, expressly securing a continuance of the connexion by an annuity in case of separation. Bill by the executor to have the bonds delivered up was dismissed with costs, the former being considered as unimpeached, the latter void at law as *pro turpi causâ*. *Gray v. Mathias*, Vol. v. 286.

See CONSTRUCTION, 5.

2. Distinction as to volunteers. The assistance of the Court cannot be had without consideration to constitute a party *cestui que trust*; as upon a voluntary covenant to transfer stock, &c. But if the legal conveyance is actually made, constituting the relation of trustee and *cestui que trust*, as if the stock is actually transferred, &c. though without consideration, the equitable interest will be enforced. *Ellison v. Ellison*, Vol. vi. 656.

3. Where testator, having originally made the purchase of a house, directed the conveyance to be made in C.'s name, which the latter executed upon the faith that he would deliver her from the payment of the money and performance of the covenants; and testator accordingly

executed part, and was only prevented by death from performing the remainder: held, that there was a sufficient consideration for supporting an action in law, and that she was entitled to stand as a creditor of the testator at law in respect of the transaction, as for money paid and expended for him; that the Master therefore had properly allowed the charge on his estate. *Crosbie v. M'Doual*, Vol. XIII. 148.

4. Voluntary bond, though void against creditors, being valid as between the parties, its surrender is a consideration that will sustain a substituted bond against creditors, unless with a fraudulent design; as by an insolvent, to substitute a valid for an invalid security against creditors. *Ex parte Berry*, Vol. XIX. 218.

CONSIGNMENT.

See WEST INDIES.

1. The Court will not interfere with the Master's appointment of a consignee unless upon special grounds and a strong case. *Bowersbank v. Colasseau*, Vol. III. 164.

2. Plaintiff being entitled upon coming of age to the produce of a West India estate, bills of lading of consignments previously made were decreed to be delivered up to him. *Hoovey v. Blakeman*, Vol. IV. 609.

3. Where mortgagee of a West India estate in possession refuses to make an affidavit that any thing remained due, order for consignee made. *Quarrell v. Beckford*, Vol. XIII. 377.

CONSTRUCTION.

And see COVENANT, *passim*.—WILL, [B.]

1. A legal instrument is not to

be construed by the acts of the parties. *Baynham v. Guy's Hospital*, Vol. III. 295. 694.

2. The rule, that words of restriction are to be confined to the last antecedent, does not hold even in criminal proceedings. *Thelluson v. Woodford*, Vol. IV. 330.

3. An instrument is to be construed without adverting to the nature of its provisions, if legal, or to what they would have been, if a particular case had been contemplated. *Mosley v. Mosley*, Vol. V. 248.

4. Legal instruments not to be construed by the acts of the parties. *Moore v. Foley*, Vol. VI. 238.

5. Different construction of the same words, applied to different descriptions of property, governed by different rules. *Elton v. Eason*, Vol. XIX. 77.

6. Different constructions of the same words in a will, with reference to the different estates; an intention difficult to attribute. *Wright v. Atkyns*, Vol. XIX. 303.

CONTEMPT.

1. There must be a reference to the Master for a proper settlement, before the contempt in marrying a ward of Court can be cleared; in such case the Court varied the settlement of the personal property to the husband for life, then to wife for life, then to the children according to appointment of survivor, so as to vest a moiety in the children at her death, but to be still subject to his appointment. *Stevens v. Savage*, Vol. I. 154.

2. An indemnity given against the consequences of a contempt, involves the party giving it. *Ex parte Dixon*, Vol. VIII. 104.

See COMMITMENT, 2.—PRACTICE, [S.]

CONTRACT.

1. Bill indorsed to a broker in consideration of money paid by him in effecting insurances, one of which was illegal; the acceptor becoming bankrupt, the petition of the indorsee to prove was dismissed as to what arose upon the illegal insurance; and the bankruptcy being some years ago, an inquiry was directed as to the rest. *Ex parte Mather*, Vol. III. 373.

2. A. employed by B. to buy smuggled goods, pays for them, and they come to the hands of B. B. shall not pay for them. *Ibid.* 373.

3. Stock transferred as a security for a floating balance, and under an agreement to continue it transferred and re-transferred by the creditor by way of loan; held a sale. *Ex parte Denison*, Vol. III. 552.

4. Contract to be jointly concerned in ship insurances is void by stat. 6 Geo. 1, c. 18, §. 12, though the policies are subscribed by the underwriters in their separate names; but though the contract could not be executed, the Court would not exclude the result of it in decreeing a general account. *Watts v. Brooks*, Vol. III. 612.

5. Insuring each other is not within stat. 6 Geo. 1, c. 18, §. 12. *Ibid.* 613.

6. A man cannot set up his own illegal act to avoid his own deed. *Ibid.* 613.

7. Smuggling transactions, or illegal dealings in stock, shall be brought into an account; though the Court would not execute the contract. *Ibid.* 613.

8. Settlement decreed according to a letter previous to the marriage,

though no express assent; the marriage having taken place immediately, a distinct positive dissent would be necessary to prevent the effect of the letter, and that could be evinced only by an actual settlement before marriage. *Luders v. Anstey*, Vol. IV. 501.

9. The time at which a contract is to be performed, material. *Ibid.* 497.

10. With respect to the performance of a contract, the time is material: therefore a bill for specific performance was upon the gross laches of the plaintiff dismissed with costs. *Harrington v. Wheeler*, Vol. IV. 686.

11. The conduct of the parties, inevitable accident, &c. might induce the Court to relieve against a lapse of the day fixed for completing a purchase. *Ibid.* 690.

And see ACCIDENT.

12. A question upon the construction of a will, whether the personal estate was wholly or partially disposed of, was not decided; an agreement upon the subject, though the instrument that was prepared was not executed, being established as clear, fair, and reasonable, not within the statute of frauds, concluded with full knowledge of the circumstances, and not waived; and the bill in effect, though not in terms, praying a performance. *Gibbons v. Cunt*, Vol. IV. 840.

13. The time for performance of a contract is material. *Omerod v. Hardman*, Vol. V. 736.

14. In enforcing contracts upon the principle of compensation, for a variance from the description, the Court has gone so far, to the extent even of wholly defeating the object of the purchaser, that where the principal subject of the contract was all the corn and hay tithes of a parish, and of the hay tithe half was

allotted to the vicar, and the other half commuted for a customary payment, the nature of that payment, the extent of meadow, and the possible conversion from arable, not distinctly appearing, the injunction against recovering the deposit was continued after answer. *Drewe v. Hanson*, Vol. vi. 675.

15. Where the time at which the contract was to be executed is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but being able to make a title at the hearing, is entitled to a specific performance. *Wynn v. Morgan*, Vol. vii. 202.

16. A. receiving goods under circumstances that would give him a right to return them, disaffirming the contract, if it would be against the interest of the other to return them, may sell them, considering himself as agent, and bring an action for the difference. *Dann v. Spurrier*, Vol. vii. 247.

17. Time not regarded in this Court as at law; for instance, the case of redemption of a mortgage, which cannot be prevented even by special agreement. So upon a mortgage at 5 per cent. with condition for 4, if regularly paid, or at 4 per cent. to have 5, if not regularly paid; the 5 per cent. regarded in this Court only as a penalty to secure the 4; and relief given upon that principle. So in the old cases, upon relief against the penalty of a bond, before the jurisdiction at law. *Ibid.* 273, 274.

18. A contract for sale of the command of an East India ship is illegal; and therefore cannot be enforced by suit upon the equity against the fund paid by the Com-

pany as a compensation, under the regulation of 1796, to restrain the practice in future. *Thomson v. Thomson*, Vol. vii. 470.

19. Upon a contract for smuggled goods, though they are received, the money cannot be recovered. So upon an illegal insurance, contrary to the act of parliament, though the money was received by the broker, it cannot be recovered. *Ibid.* 473.

20. Time is not regarded in the case of contracts in equity, as at law; but the relief against the lapse of time is in the discretion of the Court, under the circumstances. *Radcliffe v. Warrington*, Vol. xii. 326.

21. Contracts, such as a deed of gift by a client to an attorney, whilst engaged as such, by an heir, when of age, to his guardian, purchases of reversions, from young heirs, when of age, and of a trustee purchasing from his *cestui que trust*, are void as against the policy of the law, and set aside without evidence of fraud. But where it appeared that the *cestui que trust* first proposed and urged the purchase, subsequently altered the terms, confirmed and acquiesced for a long time in the ultimate agreement, the Court established the sale. *Moore v. Royal*, Vol. xii. 363.

22. Inadequacy of consideration, though not such as shocks the conscience, goes a great way to constitute fraud. *Ibid.* 373.

23. Confirmation must be clear by evidence when fraud is established. *Ibid.*

24. The true operation of length of time is by way of evidence, as in the instance of incorporeal hereditaments. *Ibid.*

25. Inadequacy of consideration, though not of itself a sufficient ground for setting aside a contract,

is when gross, strong evidence of fraud. *Lowther v. Lord Lowther*, Vol. XIII. 103.

26. Where it appeared that the plaintiff had entered into an agreement with a company of wholesale grocers called "The Fruit Club," for participating in a purchase, which was the result of such illegal combination, for the purposes of engrossing all purchases of foreign fruit imported; the Court refused to relieve as upon a transaction, which however right amongst the parties, was a wrong to the public, though not strictly regrating, forestalling, or monopoly. *Cousins v. Smith*, Vol. XIII. 542.

27. Where a legal body acts by committees, the contract may be considered as made with those who undertake, and the plaintiffs at law cannot be nonsuited, nor could they defend an action against them upon that ground. *Ibid.*

28. Ground of holding any private agreement by parties to a composition for a greater payment, or better security, void: a fraud both upon the debtor and the other creditors. *Ex parte Sadler*, Vol. xv. 55.

29. Though a defendant to a bill for specific performance of a contract, may have a decree for performance according to his construction, if adopted by the Court, without a cross bill, the decision being, not according to his construction, but only that he had contracted under a mistake, created by the plaintiff, the bill was merely dismissed. *Higginson v. Clowes*, Vol. xv. 516.

30. Specific performance decreed against a purchaser, without a reference as to the title; upon possession, and no objection made to the abstract. *Fleetwood v. Green*, Vol. xv. 594.

31. Parol evidence, in aid of a specific performance upon sale of an estate by auction, to explain, by declarations of the auctioneer, an ambiguity on the face of the particular, by a general clause for a separate valuation of the timber, and also special provisions as to the timber upon certain lots, the agreement, signed on the back of the particular, binding the purchaser, defendant, "to a strict fulfilment of this article, and to abide by the conditions and declarations made at the sale," rejected. *Higginson v. Clowes*, Vol. xv. 516.

32. Distinction where evidence is to resist a specific performance. *Ibid.* 516.

33. Specific performance decreed upon the bills of the purchaser, with compensation for a defect of title, if to be ascertained by reduction of the purchase money, if not with an indemnity; the defendant, the vendor, proposing an option to take it as it was, or relinquish the contract; the defect consisting in the representation by the particular of a church-lease for twenty-one years, with covenants for renewals to sixty-three years; the lease being actually for lives, and the covenants limited and contingent. *Milligan v. Cooke*, Vol. XVI. 1.

34. Agreement decreed to be delivered up on the ground, not of fraud, but surprise; neither party understanding the effect of it; viz. a lease, with covenant for perpetual renewal, at a fixed rent, of premises, held under a church-lease, renewable upon fines, continually increasing.

A single lease for twenty-one years refused; no terms of agreement for such an interest appearing; and under the circumstances, permission to try the effect of it at law

was refused. *Willan v. Willan*, Vol. xvi. 72.

35. Distinction between carrying an agreement into execution and disturbing it when executed; also as to decreeing it to be delivered up, or leaving the party to make the most of it at law. *Ibid.* 83.

36. Where a court of equity, refusing to execute an agreement, leaves the parties to law. *Ibid.* 86.

37. To obtain a specific performance of a contract, the subject must be proved, as described. *Daniels v. Davison*, Vol. xvi. 249.

38. Plea to a bill for specific performance of an agreement for a lease to the plaintiff, and an injunction against an ejectment, &c. that the plaintiff had, since the bill filed, taken the benefit of an insolvent act, over-ruled. *De Minkwitz v. Udney*, Vol. xvi. 466.

39. Misrepresentation, though in a slight degree, is an objection to specific performance. Distinction upon a bill to rescind the contract. *Cadman v. Horner*, Vol. xviii. 10.

40. General rule, that a court of equity will not assist a person who has obtained, or wishes to get rid of an agreement or deed on the mere ground of intoxication. Exception where any contrivance was used to draw him in to drink, or any unfair advantage made of his situation; or that extreme state of intoxication, depriving a man of his reason, which even at law would invalidate a deed. *Cook v. Clayworth*, Vol. xviii. 12.

41. Equitable discretion to lend or refuse. Aid, to execute a contract for purchase not arbitrary. *Buckle v. Mitchell*, Vol. xviii. 111.

42. The rule *In pari delicto melior est conditio possidentis* preventing suit is not universal; admitting degrees of guilt by concurring in the same criminal act. Therefore

against a private agreement, obtained by a father from his son, in derogation of an allowed sale of the command of a post-office packer, by the former to the latter; an account was decreed. *Osborne v. Williams*, Vol. xviii. 379.

43. Contract for the sale of an existing and a reversionary lease, not specifically performed without a production of the title of the lessors. The objection not waived by a primitive conditional approbation of the title by the purchaser's counsel, but the expense incurred in making out the title before this objection was taken, repaid. *Deverell v. Lord Bolton*, Vol. xviii. 505.

44. Specific performance refused under a contract for sale at a price to be fixed by arbitrators within a certain time; or if they should not agree to make their award within the time, by an umpire also within a limited time; the construction of the contract requiring the delivery of the award in writing to each party, being that, though the consequential acts, executing the conveyances, &c. might be done by representatives, it was with reference to the terms to be fixed by the award, personal to the parties. *Blundell v. Brittargh*, Vol. xvii. 232.

45. If the sums of an agreement are to be ascertained by an award, being so ascertained, it shall be specifically performed, if any thing is to be done in *specie*; conveyances, &c. not if the acts, done towards executing it by award, are not valid at law, as to the time, manner, or other circumstances, unless there has been acquiescence, notwithstanding the variation of circumstances, or part performance. *Ibid.* 241.

46. No instance where the medium of arbitration, for settling the

to the interest of which his widow was entitled for life, with power of appointment by implication in the event of an only child dead under age and intestate; and liberty to apply. *Ibid.*

8. A very slight declaration, by a competent proprietor of money, directed to be laid out in land, will take from it the character so impressed on it by the instrument. *Ibid.* 109.

9. Devise in trust to sell in such manner and at such time as the trustees shall think proper. The period of conversion, as between those entitled for life and in remainder, depends, not upon an arbitrary discretion, nor even a sound discretion in each case, but upon some fixed rule, ascertaining a given period, as upon a trust to sell with all convenient speed; controlled in this instance by consent. *Walker v. Shore*, Vol. XIX. 387.

10. Option of the parties, interested in money to be produced by the sale of land, to keep the land. *Ibid.* 392.

11. Testator gave all his real and personal estate to his executors, in trust to pay legacies; and, after a particular disposition, gave the residue of his property in trust for his next of kin; directing his executors to pay any debts upon any evidence they think proper, except the claims mentioned in the margin: a general conversion into a mixed fund applicable to all debts, none being mentioned in the margin, on evidence satisfactory to the executors, although not strictly legal. *Mildred v. Robinson*, Vol. XIX. 585.

COPYHOLDS.

And see CONVERSION, 5.

1. Copyholds cannot escheat. *Walker v. Denne*, Vol. II. 170.

COPYHOLDS.

2. Contingent remainders of copyhold will be preserved against a forfeiture by the estate in the lord; not where the preceding estates are expired. *Habergham v. Vincent*, Vol. II. 209.

3. Tenant for life of a copyhold, remainder to his first and other sons in tail, took a conveyance in fee from the lord. The premises descended upon his eldest son, who by will charged all his real estates with debts and legacies, and devised it to his brother for life, with various remainders; the estates in the copyhold are barred. *Challoner v. Murhall*, Vol. II. 524.

4. The idea of supplying a surrender began after the statute of charitable uses. *Rumbold v. Rumbold*, Vol. III. 69.

5. Copyholder having power to bar the widow's free bench by surrender, any act by him for valuable consideration will bar her in equity. *Browne v. Raindle*, Vol. III. 256.

6. *Mandamus* to the lord to admit to a copyhold does not lie. *Williams v. Lord Lonsdale*, Vol. III. 754.

7. Upon the bill of the lord a commission issued to distinguish copyhold lands within the manor, comprised in admittances produced, the last in 1693, from freehold, and compounded from uncompounded copyholds, and to ascertain the boundaries; and if they cannot be distinguished, to set out lands of the tenant of equal value with so much of the copyhold lands as cannot be distinguished. *The Duke of Leeds v. The Earl of Strafford*, Vol. IV. 180.

8. Mortgagee of a copyhold may pull down ruinous houses, and build better, to prevent a forfeiture. *Hardy v. Reeves*, Vol. IV. 480.

9. Surrender by mortgagee of copyhold to the use of his will is no

proof that he considered it irredeemable. *Ibid.* 480.

10. The lord of a manor is confined to his legal remedy for waste committed by a copyholder; and has no equity for an injunction and account. Upon the evidence, the bill was dismissed with costs. *Dench v. Bampton*, Vol. IV. 700.

11. *Quere*, Whether by the custom of a manor, timber can belong to the tenant? *Ibid.* 703.

12. No action of waste by the lord against a copyholder. *Ibid.* 706.

Quere, Whether, upon waste by a copyholder, by cutting timber, the lord can bring trover, particularly where, by the custom, the right is in both; a reversioner enters for the forfeiture, but the lord must have it presented by the homage. *Ibid.*

13. The want of a surrender of copyhold estate to the use of the will supplied in favour of a widow against co-heiresses, daughters of the deviser, married, and infant grand-daughters by deceased daughters. The Lord Chancellor was of opinion, that in supplying a surrender, the Court is to look only to the object, not to the circumstances of the parties; as, whether the heir has a provision or not. *Hills v. Downton*, Vol. V. 557.

14. The ground of supplying the want of a surrender of copyhold estate is a legal or moral obligation. *Ibid.* Vol. V. 563.

15. The want of a surrender of copyhold estate cannot be supplied for grandchildren. *Perry v. Whitehead*, Vol. VI. 544.

16. Estates surrendered to the use of mortgagees; but they had not been admitted. The mortgagor devising them, must surrender to the use of his will. *Kenebel v. Scrafton*, Vol. VIII. 30.

17. Estates pass by the surrender, not by the will; which operates as a declaration of uses. *Attorney General v. Vigor*, Vol. VIII. 286.

18. Estates not liable to debts farther than subjected. *Aldrich v. Cooper*, Vol. VIII. 393.

19. Estates not assets for specialty debts, nor even debts to the crown. *Ibid.* 394.

20. An estate held by copy of court roll, according to the custom of the manor; but in case of intestacy, distributable as personal estate, and in other respects, differing from copyhold, passed under a residuary bequest of the personal estate, not with copyhold estates under a general devise of all freehold and copyhold messuages, lands, &c. with limitations in strict settlement, upon the whole will and the circumstances. *Watkins v. Lea*, Vol. VI. 63S.

21. Husband having a reversionary interest on copyhold estates subject to a previous estate tail, devised, in general terms, all his estate, real and personal, to his wife, but made no surrender to the use of his will: from the nature of the limitation it appearing, that he did not intend to include in the devise such reversionary interest: held that they did not pass surrender necessary, in order to pass such reversionary estate. *Church v. Mundy*, Vol. XII. 426.

An admittance, in whatever terms made, enures according to the title. *Ibid.*

22. The stat. 9 G. 1. c. 29, applies only to the cases of *femes covert*, and infants coming in by descent, or surrender to the use of a will, and not by deed of settlement or appointment, resting thereupon. Where therefore a *feme covert* took a remainder as appointed, under her father's settlement, who was admitted

to the uses of such settlement, but without fine, having paid it on admission under his original title, and the lord, upon refusal of the remainderman to pay any fine, on the determination of the estate for life, brought ejectment as for a forfeiture, but failed for want of proving the deed of appointment, and afterwards filed a bill for discovery: held that the statute did not apply to such a case. *Lord Kensington v. Mansell*, Vol. xiii. 240.

Semble, the defendant in ejectment was bound to have shewn the appointment, the estate being to be taken as vested, until an appointment under the deed shewn.

The lord may apportion a fine between tenant for life and those in remainder, but he cannot throw the whole upon the latter; if he does not take any fine from the tenant for life, he cannot afterwards insist upon it from those in remainder. *Ibid.* 246.

23. Copyhold premises, purchased by the lord, tenant for life of the manor, with remainders over, taking the surrender to him and his heirs, merge; and, as parcel, are subject to the limitations of the manor; and, though under a covenant by the purchaser to surrender them by way of mortgage, to the mortgagee and his heirs, he could compel a regrant by the remainderman, no regrant having been made, the general devisees of the purchaser have no equity. *St. Paul v. Viscount Dudley and Ward*, Vol. xv. 167.

24. Devise by the general terms, "all the rest, residue and remainder, of my real and personal estate of what nature or kind soever," to nephews and nieces, not being for creditor, wife, or children, is not sufficient to raise a case of election, or for supplying the want of a surrender of copyhold land, contiguous

and intermixed with freehold, against the heir. *Judd v. Pratt*, Vol. xv. 390.

25. Devise of all freehold and copyhold estates; the copyholds were surrendered to the use of the will; but the testatrix afterwards exchanged part for other copyholds, which were not surrendered; the heir claiming beneficially under the will was put to election. *Frank v. Lady Standish*, Vol. xv. 391, n.

26. The doctrine of election applied to copyhold estates, not surrendered to the use of the will. *Ibid.* 393.

27. Upon appeal the Lord Chancellor's opinion being, that the reversion of the copyhold estate passed under the general devise, "as to all such worldly estate and effects as it may please God to bless we withal, or I may leave, or I may be entitled to at the time of my decease, whether real or personal, not before given or disposed of," especially if there was no freehold estate, inquiries were directed to ascertain that fact; and also, whether there was any custom of surrendering a vested interest in reversion or remainder, expectant upon an estate tail. *Church v. Mundy*, Vol. xv. 396.

28. Copyholder's right of surrender to the use of his will; though no instance upon the records of the manor: or, if no such custom, there must be some mode of disposition by deed; as in the case of customary freeholds; the want of which (in the case of creditors, &c.) will be supplied. *Ibid.* 403.

29. The want of surrender supplied for a widow against a collateral heir, viz. a sister: whether provided for, or not.

As to a son, *Quære*. *Fielding v. Winwood*, Vol. xvi. 90.

30. In supplying the want of sur-

render for a widow it is immaterial, how ample or scanty her provision may be. *Ibid.* 92.

31. Surrender supplied for younger children, the heir having a provision under the will, without regard to the amount. *Garn v. Garn*, Vol. xvi. 268.

32. Devise of copyhold supported by an existing surrender to the use of a will notwithstanding an intermediate surrender to other uses; under which there had never been any admittance. *Vawser v. Jeffery*, Vol. xvi. 527.

33. Though the property in mines or trees may be in the lord of a manor, it does not follow that he can enter and take it without consent of the tenant. *Grey v. Duke of Northumberland*, Vol. xvii. 582.

Distinction as to supplying the want of a surrender between a lineal and collateral heir.

34. Not supplied for a child, against a grand-child unprovided for. The answer stating only that the heir inherited no other land, an inquiry was directed, whether he had a provision, and as to the nature and extent of it. *Rodgers v. Marshall*, Vol. xvii. 294.

35. The want of surrender supplied in the case of a deed, as well as a will; but upon the same principle as in the case of a will, or the execution of a power; *i. e.* for, and against, the same persons. *Ibid.*

36. Whether purchaser of copyhold must be presumed to have notice of every thing on the Court rolls, *Quere*. *Hansard v. Hardy*, Vol. xviii. 462.

37. The lord of a manor has not by law, independently of custom, any such property or interest in the timber, growing on the copyhold premises of a tenant, as entitles him to enter and cut. *Whitechurch v. Holworthy*, Vol. xix. 218.

38. Generally, if there is no custom for the tenants of a manor to cut timber, it belongs to the lord. *Ibid.* 214.

39. It seems, there may be as to timber on copyhold premises, what may exist unquestionably as to mines, a custom, that the lord cannot take without consent of the copyholder, and *vice versa*. *Ibid.* 214.

40. Copyholder may by custom have such an interest in the timber, that he may himself cut: so he may have a special interest to prevent the lord's cutting: but such a custom ought to be proved by extremely strong evidence. *Ibid.* 214.

41. Writ of *accedas ad curiam*, to remove a real action for copyhold estate from the lord's court to the Common Pleas, superseded. *Scott v. Kettlewell*, Vol. xix. 335.

42. Devise of copyhold estate by the description of copyhold ground rent. *Walker v. Shore*, Vol. xix. 387.

And see DEVISE, 30. 32. 62. 69. 83. 106.—ELECTION, 32.—TRUSTEE, 68.

CONTRIBUTION

See BANKRUPT [P.], 4.—SURETY, 12.—TENANCY IN TAIL, 4.

COPYRIGHT.

1. *Quere*, Whether the clause in statute 8 Geo. 2. c. 13. directing, that the date and name shall be engraved on each print, relates to the penalties only, or whether that is necessary to maintain the exclusive property; if so, whether it ought to appear on the bill. *Harrison v. Hogg*, Vol. ii. 323.

2. The proprietor of a copyright must file separate bills against each bookseller taking copies of a spurious edition for sale. *Dilly v. Doig*, Vol. II. 486.

3. A work alleged to be a piracy referred to the Master. ——— v. *Leadbetter*, Vol. IV. 681.

4. The plaintiff published a book of roads of Great Britain, comprising Patterson's Road Book, to the copyright of which the plaintiff was entitled, with improvements and additions obtained by actual survey and otherwise. An injunction to restrain a publication of an edition of Patterson, comprising the plaintiff's improvements and additions, was refused. *Cary v. Faden*, Vol. V. 24.

5. Injunction against a colourable abridgment of the Term Reports B. R. among other law reports, till answer or further order upon certificate of the bill filed. *Butterworth v. Robinson*. Vol. V. 709.

6. Upon the answer to a bill by the Universities of Oxford and Cambridge, the king's printer not joining, but being made a defendant, an injunction, restraining the sale in England of bibles, prayer-books, &c. printed by the king's printer in Scotland, was continued to the hearing. *The Universities of Oxford and Cambridge v. Richardson*, Vol. VI. 689.

7. Whether the patents granted to the king's printer vest the copyright, or are merely authorities, *Quere*. Vol. VI. 713.

8. The Court will not act either by giving an injunction or an account even upon a submission in the answer, upon a publication of such a nature that an action could not be maintained. *Wolcot v. Walker*, Vol. VII. 1.

9. Injunction against an invasion of copyright, depending upon the

effect of an agreement, refused till recovery in an action. *Ibid*, Vol. VII. 1.

10. Injunction to restrain publishing a magazine as a continuation of the plaintiff's magazine in numbers, and as to communications from correspondents, received by the defendant, while publishing for the plaintiff; not preventing the publication of an original work of the same nature, and under a similar title. *Hogg v. Kirby*. Vol. VIII. 215.

11. An East India calendar, as a general subject, is not the subject of copyright, but a mere copy with colourable variations will be protected by injunction to the hearing. *Mathewson v. Stockdale*, Vol. XII. 270.

12. Court granted an injunction until the hearing to restrain the publishing Lord Melville's trial, though not founded upon legal title, but under an order of the House of Lords, prohibiting any other publication of it than that by plaintiff. *Gurney v. Longman*, Vol. XIII. 493.

13. Injunction against pirating a court calendar; the individual work creating copyright, though the general subject, as in the case of a chart or map, is common. *Longman v. Winchester*, Vol. XVI. 269.

14. Distinction between the right to publish a similar work, or set up a similar trade, and the fraud of identifying it with the work or trade of another. Injunction in the latter case. *Crutwell v. Lye*, Vol. XVII. 342.

15. Copyright in an individual work, not in a general subject, though from its nature, the consequence may be close resemblance, and considerable interference; as in the case of maps and road books. *Wilkins v. Aikin*, Vol. XVII. 422.

16. Action directed, to try whether a work on architecture was ori-

ginal; with a fair use of another work by quotation and compilation; which in a considerable degree was admitted; the injunction maintained in the mean time, viz. by permitting the sale on undertaking to account according to the result of the action. *Ibid.* Vol. xvii. 422.

17. Whether the copying of a map as an illustration in a fair history of all the maps of a county, would be restrained as an invasion of copyright, *Quære.* *Ibid.* 425.

18. Copyright in music. *Platt v. Button*, Vol. xix. 447.

19. Copyright not asserted against violations by several persons for fifteen years, not protected by injunction until established by law. *Ibid.* Vol. xix. 447.

CORPORATIONS.

And see FORFEITURE, 4.—QUO WARRANTO.

1. A corporation being trustee is in this Court the same as an individual. *Attorney General v. Foundling Hospital*, Vol. ii. 42.

2. Corporation, as such, being trustees of a school, with power to nominate and remove the master; upon bill for an injunction and discovery, alleging that the plaintiff had been removed from that office for having refused to give his vote at an election, according to the wishes of the corporation; demurrer, for that plaintiff had shown no title to the discovery, and that it might subject the parties to an indictment, overruled. *Dummer v. Corporation of Chippenham*, Vol. xiv. 245.

3. The rule, that a party whose testimony only is required, shall not be made a party, admits of exception in the case of corporations. *Ibid.* 252.

Court has jurisdiction to prevent

a corporation acting corruptly in the execution of a trust. *Ibid.*

4. Members of a corporation, as such trustees, may be called upon to answer, not only with the rest under their common seal, but also individually as to circumstances, as where the charge is of having possession, or having destroyed or cancelled deeds. *Ibid.* 254.

5. As to the validity of a bye-law of the corporation, of the company of Whitstable fishermen, that any freeman engaging in any other oyster fishery on the coast of Kent, should forfeit 10%, and until payment, should be excluded from all share of the profits which should in the mean time be divided, as if he had wholly ceased to be a freeman, and whether such suspension is open to a *mandamus*, as a temporary disfranchisement, *Quære.* *Adley v. The Whitstable Company*, Vol. xvii. 315.

6. Jurisdiction in equity against a corporation, in nature of a partnership, in favour of a member, as well as a stranger, by an account of the profits, where there is no remedy, or not a complete remedy at law; and the difficulty of executing the decree from the peculiar circumstances and nature of the property will not prevent it; though that may be a ground for some modification: for instance, not recalling profits already distributed, as an account is directed in a limited way, dispensing with vouchers, &c. upon the objection from length of time. *Ibid.* 315.

7. No instance of a bye-law restraining the individual members of the corporation from being concerned, either in any other place, or within given limits, in the same trade. *Ibid.* 322.

8. Bye-law, even in restraint of trade to a certain extent, which would not have been good under

the authority of charter may be good by custom. *Ibid.* 322.

9. Distinction between charter and contract; that which may be the subject of contract, between the different interests in a partnership, might not be good as a bye-law; for instance, an agreement among the citizens of London, who have as extensive a power of making bye-laws as any corporation, not to sell except in the markets of London, would be good, though a bye-law to that effect has been declared bad by the legislature. *Ibid.* 322.

10. The bye-law of the corporation of the company of Whitstable fisherman, that any freemen engaging in any other oyster fishery on the coast of Kent should forfeit 10*l.*, and until payment, should be excluded from all share of the profits, which should in the mean time be divided, as if he had wholly ceased to be a freeman, held void; an account was decreed, with a declaration, that the plaintiff having been unduly prevented by the bye-law from working in any manner as freeman, and participating, is to be considered, though he did not work, or tender himself, or any one for him to work, as *primâ facie* entitled in the most beneficial manner, without prejudice to the defendant's establishing, that at any particular periods he could not have entitled himself to earnings, or not as beneficial as claimed, in case no such bye-law had been made. *Ibid.* Vol. xix. 304.

COSTS.

1. No costs to any party claiming under a contract not meritorious, even though recovered upon, not even to a trustee. *Colman v. Sorrel*, Vol. i. 55.

2. Costs were refused, after a verdict upon an issue, directed and found against an illegitimate child, who had always borne the name and been received in the family. *Forbes v. Taylor*, Vol. i. 99.

3. Costs to trustees, but none for or against heir at law, defendant, who raised a point and failed. *Rashleigh v. Masters*, Vol. i. 205.

4. Costs to trustees and executors brought into Court, though they made a claim and failed, if merely by way of submission. *Ibid.*

5. Costs given; and the fund being in Court, ordered to remain till the account; the costs to come out of the balance, if any due to the party, as far as it would go. *Crowe v. Ballard*, Vol. i. 221.

6. Costs of course out of the fund to agents, receivers, and trustees, who have accounted fairly and paid money into Court. *Attorney-General v. City of London*, Vol. i. 246.

7. Costs cannot be given to a college individually, nor as a corporation, unless proved so. *Ibid.*

8. Costs given out of respective estates. *Leacroft v. Maynard*, Vol. i. 280.

9. Bill dismissed with costs as to one defendant: those costs given over against the others. *Weymouth v. Boyer*, Vol. i. 420.

10. Rule that plaintiff in bill of discovery shall pay costs in all cases, is too general: he ought only, where he files a bill in the first instance, not where compelled to it by defendant's refusal. *Ibid.* 423.

11. Costs of all parties out of the estate; if relations, as between attorney and client. *Moggridge v. Thackwell*, Vol. i. 475.

12. Bills of costs examined after a long period, and even after payments made. *Newman v. Payne*, Vol. ii. 203.

13. After verdict on issue directed,

deeds decreed to be delivered up to the plaintiff; after the Master had settled the amount of the costs, but before the report, the plaintiff died: on demurrer to so much of the will by his devisee, as prayed revivor, the Court inclined to hold the rule not to revive for costs only, not applicable where the party to receive them dies; also that the taxation would relate to the time when the amount was settled, so as to take it out of the rule: but the demurrer was over-ruled, because it did not appear on the bill that the decree had been executed by delivering up the deeds. *Morgan v. Scudamore*, Vol. II. 313.

Where the party to pay costs dies, and they are not taxed, no revivor for them only, because a personal demand. *Ibid.* 315.

14. If the debtor in costs at law dies, they die with him: if the party to receive them dies, his representative may have a *scire facias*. *Ibid.* 316.

15. Judgment for costs at law can be only under the statute, where there is judgment for the defendant; where for the plaintiff, costs are added to the debt or damages. *Ibid.*

16. Revivor for costs only on the death of the plaintiff, though before the report; and they were not to come out of a particular fund. *Morgan v. Scudamore*, Vol. III. 195.

17. No costs to a trustee whose neglect occasioned the suit. *O'Callaghan v. Cooper*, Vol. V. 117.

18. A creditor being decreed to reconvey on payment of what was due on an estate in the West Indies, acquired by an unconscientious use of legal process, was deprived of costs subsequent to the payment of money into Court. *Lord Cranstoun v. Johnston*, Vol. V. 277.

19. Upon suit abating by marriage of a *feme sole* when the bill

was filed, defendant cannot revive for cost. *Dodson v. Juda*, Vol. X. 31.

20. Court refused to require security for costs from plaintiff residing out of England, upon the representation of his embarrassed circumstances. Court only will interfere when, the plaintiff coming to ask a favour, it can fasten term. *Ogilvie v. Hearne*, Vol. XI. 598.

21. Where long inquiries were necessary as to one share of a reversionary fund, directed that each share should bear its own costs. *Basevi v. Serra*, Vol. XIV. 317.

22. There is the same reason for requiring security for costs, where the party goes to reside abroad, after answer, as in the ordinary case. *Weeks v. Cole*, Vol. XIV. 518.

23. Security for costs by a plaintiff gone abroad refused, after answer, on affidavit of his intention to return; and his family remaining in this country. *White v. Greathead*, Vol. XV. 2.

24. Distinction where costs are disposed of as a subject of relief. An appeal not open to the objection upon an appeal for costs only. *Taylor v. Popham*, Vol. XV. 72.

25. The bill being dismissed, costs to the plaintiffs on account of the difficulty and novelty of the case refused. *Wykham v. Wykham*, Vol. XVIII. 395.

And see EXECUTOR [A.] 40. *et seq.*—BANKRUPT [K.] 53: [CC.]—PRACTICE [N.]—TRUSTEE, 6. *et seq.*—PARLIAMENT, PRIVILEGE OF, 3.

COUNSEL.

1. Counsel and agent liable to costs for scandal and impertinence. *Rattray v. George*, Vol. XVI. 234.

2. Counsel or attorney cannot be

called upon to reveal the advice given to the client. Demurrer, therefore, overruled as to the case, and allowed as to the opinion. *Richards v. Jackson*, Vol. xviii. 474.

3. The former practice not to accept a retainer against a client from the adversary without giving notice, and an option, relaxed; but not to be accepted if the counsel knows what may be prejudicial to the former client, though refusing to retain. *Lord Cholmondely v. Lord Clinton*, Vol. xix. 274.

COURT, FOREIGN.

Presumption that the courts of foreign countries decide according to law; but open to evidence. *Wright v. Simpson*, Vol. xvi. 730.

COVENANT.

And see AWARD, 8.—FORFEITURE, 5. 7.—LANDLORD and TENANT, *passim*.—LEASE, *passim*.—MARRIAGE SETTLEMENT, 2.—RENEWAL, 7.

1. A covenant is satisfied by suffering property to go so as to produce the same effect: thus lands suffered to descend are a satisfaction of a covenant to purchase. *Wilson v. Piggott*, Vol. ii. 356.

2. Covenant in marriage articles by the husband to pay his wife, if she should survive, 200*l.* as a jointure, and 50*l.* to provide herself with a house yearly for life: afterwards by will he gave her for life an estate and house above the value of 100*l.* a year, with the household goods, &c. and an annuity of 100*l.* commencing and payable at different times from those in the articles: held not a performance, nor intended as a satisfaction, no such

intent being expressed. *Richardson v. Elphinstone*, Vol. ii. 356.

3. Covenant to leave a sum of money, which is not done, but personal, is permitted to descend, so that an equal or greater sum would go according to the covenant; that is a performance. *Ibid.* 464.

4. Construction of covenants the same in equity as at law; but equity will relieve against a strict performance upon equitable circumstances, and no wilful default. *Eaton v. Lyon*, Vol. iii. 692.

5. Covenant by a father to give or leave by his will all his personal estate equally among his children, does not deprive him of the right of unlimited expense, and of any fair application, even by gift, if absolute and *bonâ fide*: but a disposition for the purpose of defeating the covenant cannot stand: therefore transfers of stock to one of the children by the father were upon the circumstance of a reservation of the dividends for his life, and other evidence of a partial intention to elude the covenant, set aside. *Jones v. Martin*, Vol. v. 266. (Note).

See SETTLEMENT.—WELL, *passim*.

6. Under a joint covenant to raise a sum of money, the whole may be recovered from either. *Clough v. Clough*, Vol. v. 717.

7. Construction of a covenant in a lease, that if the lessor shall be minded to set out any part of the premises for a street or streets, or to set or sell any part to build upon, he may resume upon certain terms. If he resumed, having a *bonâ fide* intention to build, though that cannot be acted upon, there is no equity for the tenant. 2dly, The generality of the latter words are not restrained by the former to buildings of any particular species: therefore a contract with a canal company for the

lands resumed was enforced: warehouses being within the meaning of the lease; and wharfs, at least as appurtenant, and wanted for the enjoyment of the warehouses. A compensation was decreed for the land covered with water; and as to towing-paths and the banks of basons, though strictly subjects of compensation, yet, upon a re-hearing, and after great litigation, the Court would not reverse the decree, and direct another reference to the Master, merely on that account. *Gough v. The Worcester and Birmingham Canal Company*, Vol. vi. 354.

8. Covenant by the husband in a settlement, in the event of his leaving his wife surviving and children, to convey to her a full moiety of all such real and personal estate as he should die possessed of, held to be a satisfaction of her distributive share, on the ground of part performance, and that she was only entitled to a moiety of the residue of the personal estate. *Garthshore v. Chalie*, Vol. x. 1.

9. Covenant to purchase and settle lands upon the first and other sons in tail male, and the party purchases lands, taking a conveyance in fee, is a mixed case between performance and satisfaction, that would bar a demand against assets. *Ibid.* 9.

10. Where a husband covenants to leave a sum of money to a person otherwise entitled by the relation between them to a provision by law, the covenant is to be construed with reference to that, and the Court will not look to the slight difference between leaving and paying, or whether payment is to be within three or six months. *Ibid.* 13.

11. Under the words "granted and demised," there is a covenant for quiet enjoyment: so under "yielding and paying," for pay-

ment of rent. A bond generally for performance of covenants in a lease, extends to protect breaches of implied as well as express covenants. *Iggulden v. May*, Vol. ix. 330.

12. A covenant by marriage settlement, with trustees to pay the wife, in case she survived, a certain sum, makes her a creditor within the statute 13 Eliz. c. 5. *Rider v. Kidder*, Vol. x. 360.

13. Upon an agreement for a lease of a farm, specifying a great variety of covenants, adding, "such other clauses as are usual in such cases," held that a covenant not to underlet without licence was not to be introduced. *Quære*, If such a covenant would be intended, on an agreement for a lease generally, with proper and usual covenants? *Vere v. Loveden*, Vol. xii. 179. *Jones v. Jones*, Vol. xii. 186.

Such a covenant is at an end by a licence once granted. *Ibid.* 191.

14. Upon a covenant in a marriage settlement, to settle leasehold estates, as far as the law would allow, in the same way as certain real estates, which were limited to the first and other sons in tail male, with remainders over, held that it should be executed by giving an absolute interest to the first tenant in tail in possession, attaining the age of twenty-one. *Countess of Lincoln v. Duke of Newcastle*, Vol. xii. 217.

There is no difference in the execution of an executory trust created by a will, and of a covenant in marriage articles. *Ibid.* 227.

There is a distinction if the will makes a direct gift, and the articles in consideration of marriage, containing a covenant to be executed. *Ibid.*

15. Covenant in a lease not to let, set, or demise, for all or any part of

the term, without consent of the lessor in writing, restrains an assignment without consent, upon an agreement for such assignment, the defendant insisted upon her right to assign without licence, and gave notice, that if the plaintiff would not take her title, she would sell the lease to another; and did accordingly dispose of it, and thereby rendered herself incapable of performing the contract. Upon a bill for a specific performance, or issue to try what damage plaintiff had sustained, or a reference to the Master, the Court directed a reference: the relief to consist purely of pecuniary compensation. *Greenaway v. Adams*, Vol. xii. 395.

16. Where covenants are broken, and there is no fraud, and the party is capable of giving compensation, it is the province of a court of equity to interfere. *Davis v. West*, Vol. xii. 475.

17. As to the effect of a covenant to forbear suit, *Quære. Street v. Rigby*, Vol. vi. 821.

18. Covenant upon a conveyance in fee with the grantees, lessees of water-works, not to sell or dispose of water from a well, to the injury of the proprietors of the said water-works, their heirs, executors, administrators, and assigns. Whether the covenant runs with the land, so as to bind, and be enforced by assignees, whether it is contrary to the policy of the law; and as to the effect of a renewal of a lease? *Quære.* The parties left to law, and a demurrer allowed, from the inconvenience of enforcing such a covenant by injunction. *Collins v. Plumb*, Vol. xvi. 454.

19. Covenant to leave a portion of the personal estate as upon an intestacy, does not prevent the covenantor's expending the whole; nor admit his reserving part for his

own benefit, nor consequently investing it in land. *Cochran v. Graham*, Vol. xix. 66.

20. Father, under covenant for an equal division at his death of all the property he should die seised or possessed of, between his two daughters or their families, though he retains the power of free disposition by act in his life, cannot defeat the covenant by a disposition in effect testamentary; as by reserving to himself an interest for life. *Fortescue v. Henmah*, Vol. xix. 67.

21. Injunction against an ejectment for breach of covenant to insure against fire refused. *Reynolds v. Pitt*, Vol. xix. 134.

22. Relief against forfeiture by breach of covenant with reference to non-payment of money at the specified time on the erroneous notion, that by payment of interest the party is reinstated. *Ibid.* 140.

The ground in *Stack v. Leonard* (9 *Mod.* 91.) for relief against breach of covenant to repair, if not such as to make repair before the end of the term impracticable, disapproved. *Ibid.* 141.

CREDITOR.

And see DEBTOR AND CREDITOR.

—ELECTION, 35.—FRAUD, 17. 32.—LACHES, 2.—POWER, 81.—PRACTICE, [H.] 9.

1. Creditor prevented by the act of the Court from obtaining judgment, put in the same situation as if he had it. *Pulteney v. Warren*, Vol. vi. 93.

2. The property of an American loyalist having been confiscated during the American war, subject to the claims of such of his creditors, as were friendly to American independence, to be made within a limited time, and in fact according

to the evidence farther restrained to the inhabitants of the particular state, a bill to have bonds delivered up, or to compel the creditor to resort in the first instance to the fund arising from the confiscation, was dismissed; on the ground, that it did not appear that the creditor had the clear means of making his demand effectual against that fund: the Lord Chancellor also expressing an opinion in favour of the right to sue personally even in that case, against the authority of *Wright v. Nutt* (3 Bro. C. C. 326. 1 Hen. Black. 136.) *Wright v. Simpson*, Vol. vi. 714.

3. Where the Court supplies the want of surrender, it will also direct an account; the customary heir being but a mere trustee from the beginning; and as creditors might not know until the account was taken that it might be necessary to make any claim to such estates, laches will not be imputed to them as to a specific devise. *Kidney v. Cousmaker*, Vol. XIII. 158.

CROSS BILLS.

And see PRACTICE.—SPECIFIC PERFORMANCE, [A.] 30.

Cross bill, being for a mere legal title dismissed with costs, though the original bill dismissed. *Calverley v. Williams*, Vol. i. 213.

CURACY.

1. The nomination of the curate of C. having been declared by decree to be in parishioners and inhabitants paying the rates and assessments to church and poor, held that assessment gave the right, although it had not been paid, and an election, which had proceeded upon

common consent (the parish not having any representative meeting as a body), was not to be avoided by the circumstance of persons not attending to vote, nor inquiring nor objecting in a case where the rule laid down in the Exchequer is doubtful. *Attorney General v. Forster*, Vol. x. 335.

2. Various meanings of the term "inhabitant," construction always to be made with reference to the nature of the subject. *Ibid.* 339.

CY PRES.

See CHARITY, *passim*.

DEBTS.

And see ASSETS, *passim*.—DEVISE, *passim*.—EXONERATION, 8.

1. A provision by will for payment of interest of debts held not to extend to a debt by simple contract. *Tait v. Lord Northwick*, Vol. iv. 816.

2. The personal estate is the natural fund for the debts, and can only be exempted by the intention to exempt it expressed in the will: a charge upon a real estate, however anxious, is not of itself sufficient. *Ibid.* 816.

3. Residuary disposition of all the testator's real and personal estate in Jamaica, in trust to be remitted to England, was held specific, and not to include a debt, originally upon bond and judgment in Jamaica, and afterwards farther secured by bond and judgment in England, under which it was received, and being considered undisposed of was applied in the first instance to the debts, &c. *Nisbett v. Murray*, Vol. v. 149.

4. As to the difference between

debts and legacies in an implied charge on real estate by will, *Quære. Keeling v. Brown*, Vol. v. 362.

5. The general personal estate not specifically bequeathed applied first in payment of all the costs, except of inquiries as to a guardian and maintenance for a specific legatee, and then to the general legacies. *Barton v. Cooke*, Vol. v. 362.

6. Bequest of a debt, as it stood on a certain day, good. *Gaskell v. Harman*, Vol. vi. 170.

7. Where it appears by the answer, that the real estate must be responsible, as, that there is no personal estate, to be first applied to debts, a receiver will be granted in the first instance. *Jones v. Pugh*, Vol. viii. 71.

8. Real estate under a charge by a will duly attested liable to debts afterwards contracted, and legacies by an unattested instrument. *Sheddon v. Goodrich*, Vol. viii. 495.

9. If a substantive and independent intention to convert the real estate at all events into personal, can be found, that will make the real estate liable to debts, but not where there is only a specific purpose, if such purpose should fail by lapse, the heir would take. *Gibbs v. Ougeir*, Vol. xii. 413.

If the Court sees at any period that creditors by simple contract will be deprived by specialty creditors going against their fund, it will, without being called upon of itself, direct the assets to be marshalled. *Ibid.* 416.

10. Debt discharged by a bill taken as a discharge and satisfaction: otherwise not until payment. *Ex parte Hodgkinson*, Vol. xix. 291.

11. Death of the debtor in prison by commitment of a court of equity for breach of an order of payment under an award, does not extinguish

the debt, as on a writ of *capias*: the former not, as the latter, excluding other remedies; and the statute James 1. preventing satisfaction. *Mildred v. Robinson*, Vol. xix. 585.

DEBTOR AND CREDITOR.

1. Two terms in prison without being charged in execution is entitled to his discharge. *Ex parte Cundall*, Vol. vi. 446.

And see DEBTS, *supr.* 11.—CREDITOR, *passim*.

2. The general principle, on which a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless collusion, insolvency, or some special case, applies equally to the case of a creditor over-paid by the executor. In a case of that sort upon the circumstances of suspicion, particularly attending to the character of the creditor, as attorney and confidential agent to the testatrix, an issue was directed. *Alsager v. Rowley*, Vol. vi. 748.

3. Where the executor could not afford to act, and the heir refused to decide, Court allowed creditors to act against parties responsible to the testator's estate. *Burroughs v. Elton*, Vol. xi. 29.

4. But where such creditor was a creditor by judgment, 17 years old, and no proceedings had been taken at law to revive it, *quære*, if such creditor could have a decree. *Semble*, the Court would retain the bill to give him an opportunity of trying an issue, whether the debt is yet due, or of substantiating it by a proceeding at law if necessary. *Ibid.* 36.

5. The practice is for judgment creditors to go before the Master with the record of the judgment, and swearing that the debt is due. *Ibid.*

6. Where the creditor seeks to establish by his suit an agreement for the carrying on a colliery, he must take the concern with all its engagements, and the Court will not require security to be given for the result of the account. *Ibid.* 39.

DECREE.

And see PRACTICE, [H.]

1. Motion to open the enrolment of a decree, and to stay proceedings under it, to give an opportunity of appeal, refused; the decree being made upon the merits, as at law a judgment by default is vacated upon motion, not a judgment on the merits. *Charman v. Charman*, Vol. xvi. 115.

2. Right of creditor by decree or judgment to come in under a general decree without reviving. *Mildred v. Robinson*, Vol. xix. 585.

3. Decree, though equal to a judgment as to personal estate, does not affect land. *Ibid.* 585.

DEEDS.

[A.] EXECUTION, PROOF.

[B.] CONSTRUCTION AND EFFECT.

[C.] SET ASIDE, PRODUCTION OF.

[A.] EXECUTION, PROOF.

1. Sealing and delivery essential to a deed; which if delivered may be a good deed, whether signed or not. If to be executed under a power with signature and sealing, both are necessary. *Wright v. Wakeford*, Vol. xvii. 459.

2. Cross examination as to the execution of deeds. Order in the alternative, either that the examiner, with whom they were, should cross examine, or that they should be de-

livered to the examiner for the other party for that purpose. *Turner v. Burleigh*, Vol. xvii. 354.

3. Witness to a deed must state what actually passed, and not prove the execution by a general phrase, although in the case the objection was not allowed to prevail, the execution itself not being put in issue. *Burrows v. Locke*, Vol. x. 470.

In general a witness cannot contradict his attestation, but under circumstances other evidence is admissible. *Ibid.*

4. Whether the rule, that a deed thirty years old proves itself, applies to a will, *Quere*. *M'Kenire v. Fraser*, Vol. ix. 5.

5. Though a formal mistake in a deed may be rectified by articles, of which it purports to be an execution, essential additions cannot be made to a conveyance from articles, of which it does not purport to be an execution; nor can the transaction be rescinded by the Court. *Mosely v. Virgin*, Vol. iii. 184.

6. Whatever is wanting to show the consideration, and from whom it moves, may be supplied by evidence *dehors* the deed; where such evidence does not contradict the deed. *Hartopp v. Hartopp*, Vol. xvii. 192.

7. Deed not to be represented as sealed, until the seal is put by the party to the wax or wafer. Whether, having sealed, he can be heard to say, he had not delivered, *Quere*. *Ex parte Hodgkinson*, Vol. xix. 296.

8. Signing, as well as sealing, a common bond, for money, unnecessary. *Ibid.* 296.

[B.] CONSTRUCTION AND EFFECT.

And see EVIDENCE, [A.]

1. Deed construed as from the moment of execution, not by subsequent events. *Balfour v. Welland*, Vol. xvi. 156.

2. As to extending or reducing an express limitation in a deed by implication, *Quære. Wykham v. Wykham*, Vol. xviii. 422.

3. Instrument, though void at law, may be sustained in equity. *Ibid.* 423.

4. A deed not to be varied by parol evidence of the actual agreement. *Jackson v. Cator*, Vol. v. 688.

5. A deed is construed more strictly than a will, according to the legal import of the words; therefore in a marriage settlement, after life estates to the husband and wife, a remainder to the heir male of her body by him to be begotten, and to her heirs, and for want of such issue to the daughters; and if no issue of the marriage, to the right heirs of the husband, was held a contingent remainder in fee in such person as should be heir male of the wife at her death. *Bayley v. Morris*, Vol. iv. 788.

6. Under a limitation by deed to the father for life, remainder to his issue male, remainder to the father in fee; the sons took by purchase as joint tenants for life only; the word "issue" in a deed being a word of purchase. *Ibid.* 794.

[C.] SET ASIDE, PRODUCTION OF. And see FRAUD, 27. 29, 30.—JURISDICTION, 14. *et seq.*

1. Bill to have deeds delivered up on assigning stock, alleged to have been obtained under undue influence and an account of weekly expenditure dismissed, the evidence of direct influence appearing to be considerably subsequent to the deeds, and the defendant, a married woman, having only stock, as separate property, upon which the Court having no lien, could not give execution. *Nantes v. Corrock*, Vol. ix. 182.

2. Where the parties executed deeds under the influence of gross

misrepresentation of the legal agent, and under circumstances of extreme distress and ignorance of their rights, and the greatest inadequacy of consideration, the deeds were set aside, after a lapse of 12 years, but the account limited to the time of filing the bill. *Pickett v. Loggan*, Vol. xiv. 215.

3. Where the party in whose favour a voluntary conveyance had been made had been a confidential agent in the management of the affairs of the grantor or widow, and appeared to have been obtained under an abuse of that influence and confidence, decreed to be set aside upon the principles applicable to the relation of guardian and ward, &c. *Huguenin v. Baseley*, Vol. xiv. 273.

4. A court of equity may deprive third persons, though not parties to the fraud, of the benefits which they have derived from the fraud, imposition, or undue influence of others. *Ibid.* 289.

5. Where deed is not sufficient to pass the estate, but party must come into equity, Court never executes a voluntary agreement. *Colman v. Sarrel*, Vol. i. 54.

6. So where necessary to come into equity to raise an interest by way of trust, there must at least be a meritorious consideration. *Ibid.*

7. Upon bill by heir at law for discovering and delivering up, or depositing title deeds, against persons holding then as executors, and having possession of the premises under an agreement with a tenant by the curtesy, plaintiff need not state every link of his pedigree. *Ford v. Peering*, Vol. i. 72.

8. *Primâ facie* deeds are property in the custody of tenant for life. They may be taken from a jointress, upon her jointure being confirmed. *Ibid.* 77.

9. Where tenant for life is satisfied, and does not care about the title, but remainder man is not satisfied, the Court will take care for their security. *Ibid.*

10. Where the bill was framed without the knowledge that the deed existed, and the fact came out only by the answer, as well as that it was in defendant's possession, but it was not described, nor any made to produce it, as the Court should direct, held that the plaintiff could not compel production of it. *Atkins v. Wright*, Vol. xiv. 211.

11. When the defendant admits the deed to be in his possession, and submits to produce it, as the Court shall direct; it is only a submission to the discretion of the Court as to whether it ought to compel production of it or not. *Ibid.* 213.

12. Deeds not delivered out of Court to any devisee, unless the heir is before the Court. *Anon.* Vol. i. 29.

13. Court will not order deeds to be delivered up on petition. *Ex parte Poole*, Vol. i. 160.

DEMURRER.

And see PARTIES.—PLEADING, *passim*.

1. The ground of a demurrer must be a short point, upon which it is clear the bill would be dismissed with costs, at the hearing; therefore upon a bill by assignees of a bankrupt for specific performance of an agreement previous to the bankruptcy, to grant a lease, the case, consisting of a combination of circumstances, the evidence might sustain the relief with some modification, upon which a demurrer was overruled. *Brook v. Hewitt*, Vol. III. 253.

2. Order for defendants to be at

liberty to withdraw a demurrer set down to be argued on payment of costs to be taxed. *Downes v. The East India Company*, Vol. vi. 586.

3. No decree, where the defendant might have demurred. *Baker v. Dacie*, Vol. vi. 686.

4. General demurrer lies; the plaintiff being entitled to discovery, but not to the relief. *Ibid.* 686.

5. Demurrer *ore tenus*. *Pyle v. Price*, Vol. vi. 779.

6. No general rule, whether a demurrer for want of parties must state the parties. *Ibid.* 781.

7. Bill by creditors by judgment, who had sued out elegits, for a discovery of freehold estates, charging, that the defendant upon his election as member of parliament; previously to the judgments, gave in his qualification; and if the estates composing it were conveyed away since, it was without consideration. Demurrer as to the qualification, &c. and answer to the rest, but not going to the charge of conveyance without consideration; the demurrer was overruled. *Mountford v. Taylor*, Vol. vi. 788.

8. Bill alleging fraud as to quantity and quality of goods sold, not discovered till they were exported to America; that they were sold in consequence at a loss; and the plaintiff being threatened with an action, paid the original price according to the contract, under a protest, that he would seek relief in equity; and praying an account and payment in respect of the loss, and a commission to America. Demurrer allowed. *Kemp v. Prior*, Vol. vii. 237.

9. The rule, that if the plaintiff is not entitled to the relief, though entitled to discovery, a general demurrer holds, does not preclude the defendant from demurring to the relief, and answering as to the dis-

covery. *Hodgkin v. Longden*, Vol. VIII. 2.

10. Demurrer allowed: the bill not alleging with sufficient certainty, by whom the duties claimed by the City of London under letters patent, in respect of which a discovery was prayed in aid of an action, were payable. *The Mayor, &c. of London v. Levy*, Vol. VIII. 398.

11. Though a demurrer cannot be good in part and bad in part, as to the matter demurred to, it may be good as to one defendant, and bad as to another. *Ibid.* 403.

12. A bureau delivered for the purpose of repairs to a person who discovered money in a secret drawer, which he converted to his own use. This amounts to a felony; and upon that ground a demurrer to a bill of discovery was allowed. *Cartwright v. Green*, Vol. VIII. 405.

13. A married woman may demur to a discovery, that would subject her husband to a charge of felony. *Ibid.*

14. *Ore tenus*. Vol. VIII. 408.

And see DISCOVERY.

DEPOSIT.

And see MORTGAGE EQUITABLE.

Bill remitted, indorsed, merely to enable the person receiving it to raise money to meet future advances, is, while retained, a mere deposit, applicable to the demands of the remitter, subject to the right, under the indorsement, of constituting a third person creditor by negotiating it; who in case of bankruptcy will prove. *Twogood, ex parte*, Vol. XIX. 232.

DEPOSITIONS.

See EVIDENCE, [F.]

DEVISE.

DEVASTAVIT.

Discharge, by *Habeas Corpus*, from commitment under an attachment for breach of a writ of execution of a decree for payment of money on account of a *devastavit*, as executor; committed before, though not ascertained by the report, or decreed to be paid, till after, the time, fixed by an insolvent act; of which the party had taken the benefit. *Wheldale v. Wheldale*, Vol. XVI. 376.

DEVISE.

And see ASSETS, *passim*; BARON AND FEME, [C.] 21; LEGACY, WILL, *passim*.

1. Testator gave a legacy to his son, an estate in fee to his nephew, then several parts of his freehold, and a future purchase of freehold to be made with part of his personal and all leaseholds to his wife for life; then to his son and his issue lawfully begotten or to be begotten, to be divided between them as he should think fit, if he die without issue, all to be sold, and the produce to go over. No part of his present freehold and leasehold, or the estates, to be purchased, to be sold during the life of his wife and son: all the rest and residue of effects whatever, after payment of debts, &c. to the wife. The son held to be tenant for life, and the devise over good; but estate not mentioned, not to pass by it. *Hockley v. Mawkey*, Vol. I. 143.

2. Heirs or issue, where intended to take distributively, must take as purchasers. *Ibid.* 149.

3. Gift to A. and his issue to be divided among them as he thinks fit; the issue have an interest at all events, and A. has no authority, but as to the apportionment, if no

appointment, equally. Where to be divided among issue, the proportions must not be illusory. Issue will extend to any remote degree as a description of objects of the power of A. to distribute among them as he thinks fit; but they must be all in existence during his life. *Ibid.* 150.

4. A particular estate may be considered to be given for the sake of limitation over: a residuary clause is a mark of intention, but not a sufficient ground to say that it was absolutely the intent there should be something to satisfy it. *Ibid.* 151.

5. Personal to be laid out in land, but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession; and passed by such general words in a will as would pass land. *Rashley v. Masters*, Vol. 1. 201.

6. "All my estates in law and equity" in a will will pass personal to be laid out in land. *Ibid.* 204.

7. Devise of personal and of rents and profits of real in trust to accumulate, and be laid out in land to be conveyed with the real to the youngest or only son of the trustee at 21: held a vested interest by executory devise in an only surviving son, and not to wait till the death of the father: but liable to be divested by birth of another son. The trustee survived his son several years, and received the rents and profits till his death, but never laid them out in land, as directed: those accrued after the son made his will held to be an equitable interest in land, and therefore to pass by it. *Perry v. Philips*, Vol. 1. 251.

8. A possibility is deviseable. *Ibid.* 254.

9. Any equitable interest is deviseable. *Ibid.* 254.

10. Testator cannot by any words devise lands either under the statute or at common law, which he had not at the time of making the will. *Ibid.* 255.

11. In cases of contracts for land before but executed after making a will of land, the subsequent execution is not a revocation: the legal interest coming in *esse* afterwards would not pass by the will at law, but in equity is bound by the prior devise of the equitable interest. *Ibid.* 255.

12. An express immediate disposition in a will not controlled by subsequent inference. *Collett v. Lawrence*, Vol. 1. 269.

13. Some effect must be given to every part of a will. *Ibid.* 269.

14. Devise of absolute interest to one, with any expression that he shall dispose of the whole or part to A. not properly a devise, but a trust for A. which the Court will execute after the death of the first devisee. *Ibid.* 271.

15. Devise to one for life or absolutely, with directions that he shall dispose of it to another at his death, operates as an immediate devise without any such disposition. *Ibid.* 271.

16. Devise of personal for life, then amongst all children of devisee in such shares, interests, survivorships, and times of vesting, as devisee should appoint; and on default thereof, equally, if but one, to that one payable at 21. Nevertheless, the shares of any attaining 21 in the lifetime of devisee for life to be vested; but payment to be postponed till her death: that clause vesting an interest at 21 held to relate only to the case of default of appointment; and one of two children being dead without issue after 21, and without receiving any share, that circumstance will not prevent

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appointment of the whole fund to the survivor. *Boyle v. Bishop of Exeter*, Vol. 1. 299.

17. Testator after giving life interests in stock to each of his daughters, afterwards the principal among his grandchildren, in pursuance of a power in articles of partnership appointed his executors to carry on the trade in his room, with power to dissolve, or nominate any other person: and gave them his share of the capital and all freehold and leasehold in trust to carry on the trade as long as they should think fit; and after expiration of partnership to sell the estates, and with the produce, and profits of the trade, and all the rest of his estate, form a fund to accumulate twelve years; then among the grandchildren living: by codicil he substituted his partner, who was his son-in-law, in the room of one executor removed; and desired, that if his executors should continue trade, and his grandsons T. and J. should attain 21, his executors would nominate each a partner for a quarter, when executors should think fit, with legacies at the same time, to sink into the estate, if they should decline the partnership, or die before 21; executors to advance any farther sum they might want to carry on trade; the rest of his property among all the grandchildren except T. and J.: by another codicil he left it entirely in discretion of the executors to appoint J. or not; if they should not think proper, his legacy to be void: T. and J. both entitled to be partners and to their legacies at 21, one executor, their father, being for admitting them, the other two against it: but if all had without fraud united in declaring J. unfit, they might have excluded him; in which case he could have taken nothing under this de-

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viser. *Wainwright v. Waterman*, Vol. 1. 311.

18. Testator devised his estate upon trust, that his mansion-house, park, garden, &c. pictures, plate, furniture, &c. (to go as heir-looms) should by the trustee be kept in hand, and in good order and repair, till all incumbrances paid; upon farther trust to permit testator's daughter to have, hold, occupy, use, and enjoy his said mansion-house, park, garden, &c. pictures, plate, furniture, &c. for life; upon farther trust to lay out from rents and profits all he should think necessary to keep the mansion-house, &c. in repair, then to pay the daughter an annuity of 600*l.* for life (for whom he also charged the estate with 10,000*l.*), and to apply the surplus in discharging the incumbrances, from which he excepted the mansion-house, &c.; he gave the trustee 200*l.* a year above all charges; and after charges paid limited the estate over; the daughter occupied the house till her death; afterwards the trustee lived in it: the daughter held to have had an equitable life estate in the house, &c. as excepted from the general devise to the trustee; who therefore upon account was not allowed for rates and taxes paid, and expense of the garden defrayed by him during her life; but allowed for them afterwards, because under this will necessary for him to occupy either himself or by a servant: allowed for necessary expense of procuring a thing to be done, which turned out to be reasonable, though he might have come to the Court to see whether it was proper: not allowed for costs of a suit against the daughter voluntarily paid by him, even though she was entitled to them from the estate; nor for a park-keeper upon the trust estate,

because used as his own servant. *Fontaine v. Pellet*, Vol. 1. 337.

19. Testator's mistake not rectified, because nothing to show what would have been the intention, if no mistake. *Smith v. Maitland*, Vol. 1. 362.

20. Legacy out of a fund in the East Indies given over in case of death of legatee before he might have received it, vested from death of testator. *Hutchin v. Mannington*, Vol. 1. 366.

21. Estate devised on trust to be sold with all possible diligence, or in reasonable time, considered as sold from testator's death. *Ibid.* 367.

22. Devise properly attested of land upon several trusts, remainder to such trusts as testator should by any deed appoint: whether land would pass by the deed of appointment sent to law, upon a case stating the devise to be to uses. *Haberg-ham v. Vincent*, Vol. 1. 410.

23. Land devised in trust to pay debts and legacies, charged with all that the Ecclesiastical court would establish. *Ibid.* 411.

24. Devise of lands to be sold; money produced by sale charged with simple contract debts on the intention, though doubtful. *Kidney v. Coussmaker*, Vol. 1. 436.

25. "After paying debts," amounts to a charge for debts; for which very little is sufficient, the Court leaning that way. *Ibid.* 440.

26. But the leaning to charge land with simple contract debts must be warranted by the intention. *Ibid.* 443.

27. Where testator combines real with personal generally, the real is subject to all the burthens of the personal. *Ibid.*

28. Intent may be argued from, though the words by which it appears were unnecessary. *Ibid.*

29. Lands purchased after a general devise pass under it, republication being implied from a codicil concerning personality referring to the will, directed to be taken as part of it, and attested by three witnesses. *Barnes v. Crowe*, Vol. 1. 486.

30. Bond to pay an annuity till a legacy recited to have been bequeathed by the last will of obligor to obligee should be paid: by a previous will he had given a legacy: but that was revoked by a subsequent will; and a less legacy given payable six months after testator's death, "over and above the annuity, which I have secured to him for his life:" the annuity and bond were assigned by the obligee "as some provision for his mother, to be received by her during the life of the obligor as fully and beneficially as it could have been by the obligee:" the bond and assignment were put into the possession of the testator; and continued so till his death: the legatee is entitled to the legacy with interest, if not paid at the time; and also to the annuity for his life in trust for his mother. *Crosbie v. Murray*, Vol. 1. 555.

31. Devise may be by implication, if upon a clear presumption. *Ibid.* 561.

32. Devise of lands to be sold in aid of personal, "and after death of my wife the estates not sold and the personal not applied to be subject as after mentioned; the rents and produce to be carried on in accumulation of 3 per cents, as aforesaid during her life, and also for five years after her death, and to be laid out in land; then if my son M. shall be living, and any lawful issue of his body, and if my son G. shall be living, and any lawful issue of his body, to them for life as tenants in common, then to their issue in moieties; if only issue of one, to

that issue; if but one, to that one;" with power of settlement; "my wife to receive such provision as aforesaid neat and clear, and the residue only to be subject to the devise over to take place after her death; and if both my said sons shall be dead without issue," then to his daughter for life; after her death to her son, his heirs, &c. and if she should have any other issue, to them, their heirs, &c. on failure of issue of his sons and grandson: the devise over is attached to the single event of both sons being dead without issue at the death of the wife, or five years after at most; and one son being alive at that time, though without issue, it never took effect: but the son is not entitled to the estate absolutely on account of the contingent interest in his issue. *Graves v. Bainbrigge*, Vol. I. 562.

33. Devise of lands, tenements, and hereditaments, subject to a term of eleven years in trust to receive the rents, issues, and profits of the premises, that from time to time should accrue and become due, and dispose, &c.: an advowson in gross passes; and a sale of the next presentation within the term by direction and for the benefit of the *cestuy que trust* was established. *Earl of Albemarle v. Rogers*, Vol. II. 477.

34. Bequest to the use and behoof of A. and in case of her decease, to the use and behoof of her children, share and share alike: held a life interest only in A. the capital to her children after her decease. *Lord Douglas v. Chalmer*, Vol. II. 501.

35. Testator devised all the residue of his estates, as well copyhold as freehold, " (the copyhold part thereof having been previously surrendered to the use of my will)" upon several trusts in favour of his wife and children: the only trust

for his eldest son and heir was an annuity of 300*l.* for life; remainder to his wife and children: the testator having never surrendered his copyhold, it was held a mistaken description, the copyhold being clearly intended to pass; and the annuity being much more valuable, the heir was decreed to elect; and was not bound by receiving half a year's payment of the annuity, while abroad. *Rumbold v. Rumbold*, Vol. III. 65.

36. Testator devised his real estate to the eldest of his three natural daughters and her husband for their joint lives and that of the survivor: remainder to her sons successively in tail made; remainder to the second and her husband and issue male in the same manner; remainder to the youngest, or such person as she should first marry, (if under twenty one, with consent of trustees, for their joint lives and that of the survivor, with similar remainders: he also gave a rent-charge limited in the same manner to the second, her husband, and issue male; and gave a similar rent-charge to the youngest, (under and with the restriction above-mentioned), or for her life; and when she shall marry as aforesaid, upon the same trusts; and having given the second 10,000*l.* on her marriage, he gave the youngest a legacy of 10,000*l.* payable, 5,000*l.* upon her marriage (with such consent as aforesaid), and 5,000*l.* two years after. Upon her marriage without consent, the condition being established, the husband does not affect her estate for life in the rent-charge. *Stackpole v. Beaumont*, Vol. III. 89.

37. Devise of all freehold and copyhold lands " (the copyhold part whereof I have surrendered to the use of my will)" subject to debts some were surrendered; others not

the latter did not pass. *Wilson v. Mount*, Vol. III. 191.

38. Real and personal estate devised to the executor in trust to pay debts and legacies; the rest and residue to himself: the only purpose of devising the real appearing to be to ensure payment of the debts, without any intention to disinherit the heir, it was held only a charge; and that the heir was entitled to the surplus of the real estate. *Halliday v. Hudson*, Vol. III. 210.

39. Devise to A. and his wife for life, and after the death of the survivor upon trust to sell and apply the produce to and amongst the issue of A. by his said wife and their representatives equally: the fund belongs to the children surviving the testator; but the issue of a daughter who died in the lifetime of A. are entitled as representatives against the claim of their father as administrator. *Horsepool v. Watson*, Vol. III. 383.

40. Real estate devised to be sold and the produce disposed of with the personal, with a power to direct the fund to be laid out in land: no such direction having been given, it was held personal property. *Maberly v. Strade*, Vol. III. 450.

41. Devise to A. and her heirs; but if she dies under 21 and unmarried, to B. and her heirs: A. dies in the life of the testator, under 21, and without issue, but having been married: the heir is entitled. *Chitty v. Chitty*, Vol. III. 545.

42. Testator devised real estate to A. in tail male, remainder over; and gave a sum of money in trust to be laid out in land, to be settled to the same uses; by codicil he devised the same real estate to B. and his heirs; and gave every thing he had given to A. in as ample a manner to B.: B. held tenant in fee of the real estate, and entitled to have

the money paid to him. *Younge v. Combe*, Vol. IV. 101.

43. Devise of real estates of the annual value of near 5,000*l.* and other estates directed to be purchased with the residue of the personal estate, amounting to above 600,000*l.* to trustees and their heirs, &c. upon trust during the lives of the testator's sons, A. B. and C. and of his grandson D. and of such other sons as A. now has or may have, and of such issue as D. may have, and of such issue as any other sons of A. may have, and of such sons as B. and C. may have, and of such issue as such sons may have as shall be living at his decease or born in due time afterwards, and during the life of the survivor, to receive the rents and profits, and from time to time invest the same, and the produce of timber, &c. in other purchases of real estates; and, after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, and that one lot shall be conveyed to the eldest male lineal descendant then living of A. in tail male; remainder to the second, &c. and all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons, to whom a prior estate is limited, of A. successively in tail male; remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of B. and C. as tenants in common in tail male in the same manner, with cross remainders; or if but one such male lineal descendant, to him in tail male; remainder to the trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively in the same manner, and with simi-

lar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed, that the trustees should stand seised upon the failure of male lineal descendants of A., B., and C. as aforesaid, upon trust to sell and pay the produce to his majesty, his heirs and successors, to the use of the sinking fund; the accumulation, till the purchases or sales can take place, to go to the same purpose; with a direction, that all the persons becoming entitled shall use the surname of the testator only. The trusts of the will were established. *Thelluson v. Woodford*, Vol. iv. 227.

44. The intention of the testator if clear and consistent with the rules of law, is to govern, without regard to the grammatical construction, or whether it deserves favour or not. *Ibid.* 311.

45. General devise of all manors, messuages, lands, tenements, and hereditaments, in the county of York, or elsewhere, with long limitations in strict settlement; and a residuary disposition of the personal estate also by very general words. The Lord Chancellor was clearly of opinion, that two leasehold houses passed with the personal estate, and not under the devise of the land; but granted a case. *Thompson v. Lawley*, Vol. v. 476.

46. General residuary clause in a will passes what is not well disposed of. *Brown v. Higgs*, Vol. v. 501.

47. Testator gave, devised, and bequeathed, all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, and all his monies in the funds, to trustees, their heirs, executors, administrators, and assigns, according to the several and respective estates and interests therein; and declared the trust of the rents, issues and profits, dividends, interest, and proceeds, subject to

ground rents, and other out-goings, in respect to his said messuages, lands, &c.: the leasehold estates pass with the freehold upon the subsequent words. *Hartley v. Hurle*, Vol. v. 540.

48. Under a general residuary disposition by will to a natural son, his heirs, executors, administrators, and assigns, for ever, to and for his and their own proper use and behoof, a trust estate does not pass. *Ex parte Brettell*, Vol. vi. 577.

49. Devise of all freehold lands would include lease for lives; though the limitations are inapplicable. *Watkins v. Lea*, Vol. vi. 642.

50. Devise upon several limitations for life, and in strict settlement; with a direction, that incumbrances shall remain charged upon the estates respectively, until discharged by the several tenants for life, to whom they are respectively limited. All the rents and profits during the estates for life are to be applied to the incumbrances, principal as well as interest. *Milnes v. Slater*, Vol. viii. 295.

51. Every devise of real estate, whether in general terms or not, is in nature of a specific devise: otherwise, as to personal estate. *Ibid.* Vol. viii. 305.

52. Although under the general word "estate," real estate will pass, yet it may be restrained by the whole context of the will, if it appear not to have been the intention of the testator. *Woollam v. Kenworthy*, Vol. ix. 137.

53. Devise to A. and the heirs of his body of freehold and leasehold, with the same limitation over if he has no such heirs, an estate tail on the freehold, and an absolute interest in the leasehold. *Crooke v. De Vandes*, Vol. ix. 197.

54. A simple bequest of a legacy or residue to A. and B. without

more is a joint tenancy, and the previous disposition of the interest, with words of severance, cannot control the plain legal meaning of the terms used. *Ibid.* 204.

55. A bequest to two persons or their children, held to give the children an interest by way of substitution only, not concurrently. *Ibid.*

56. Construction of a residuary disposition, to mean the general residue not a special one, where the events and natural sense of the words warranted. *Ibid.*

57. Devise to testator's wife for life, and after "unto and amongst all and every our children, in such manner and in such proportions as my said wife shall either in her life-time or by her last will appoint," and empowered her to sell the estates and receive the interest for her life, and after her decease testator directed both principal and interest to be paid and applied "to and among our children, in such proportions as aforesaid;" the event was, that all the children died in the life-time of their mother, who died without making any appointment, held that the children took several estates of inheritance as tenants in common. *Casterton v. Sutherland*, Vol. ix. 445.

58. Devise to son, whom he also made executor, of all the real, not specifically disposed of, subject to debts generally and legacies to daughters, and also all his personal. The son devised part of the real to his sister for life, remainder to her children in fee. By a deed three months after, reciting that he was liable to her legacy by having taken upon him the execution of the will, and a former agreement to charge that legacy upon a particular part of his estate, he mortgaged the estate so devised for that legacy, and covenanted in the deed to pay

it; three months after, by a codicil expressing doubts of his personal being deficient, he created a trust of some real estates for all his debts of what nature and kind soever consisting at the time of his death, also legacies and funeral expenses, held that the legacy did not become a personal debt of the son, and therefore the mortgaged estate remained charged, and was not exonerated by the assets. *Hamilton v. Worley*, Vol. 11. 61.

59. The equity to have real estate exonerated by personal subsists only between the heir or devisee, and the residuary legatee, not against specific or general legatees, much less creditors. *Ibid.* 65.

60. Testator directed money to be laid out in lands, &c. on very long terms, with limitations applicable to real estate, the money not having been so laid out, the crown, on failure of heirs, has no equity against next of kin to have it laid out on land, in order to claim escheat; the devisees becoming absolutely entitled have the option given by the will, and a deed of appointment by one a *feme covert*, held a sufficient indication of intention, that it should continue personal against the heir claiming it as ineffectually disposed of for want of her examination. *Walker v. Denne*, Vol. 11. 170.

61. Trustee not having the legal estate, cannot hold against the crown claiming by *escheat*. *Ibid.* 170.

62. Testatrix, mortgagee of an estate of which her brother was tenant for life, and having his bond for some arrears of interest, bequeathed to him "the arrears of my mortgage upon his estate, and a bond from him in my possession," the principal mortgage money did not pass. *Hamilton v. Lloyd*, Vol. 11. 416.

63. Devise, subject to a term of 1000 years to A. in strict settlement, remainder to B. in strict settlement, and after other limitations in tail, remainder upon trust to be sold; the trust of the term was to raise 4000*l.* to be applied first to debts, legacies, &c. the rents, profits, &c. arising, or received from the real and personal to be applied to debts and legacies, and afterwards to be an aggregate fund and attend the inheritance; the interest of the 4000*l.* to be paid out of the rents, &c. of the estates in the term: rents and profits to accumulate till one of the devisees should attain 21, then to be paid to him. By codicil, testator reciting the trust to sell, bequeathed part of the produce, and gave all the residue, and all the residue of his personal not disposed of by his will to his legatees; the residue of the money raised under the term, and of the personal, is to attend the inheritance, and the interest is payable to the tenant for life, the principal to the first tenant in tail. *Sheldon v. Barnes*, Vol. 11. 444.

Land devised to be sold and the produce applied as after mentioned, and no disposition is made, heir shall take. *Ibid.* 447.

64. Testator created a term for debts and legacies, and gave 1000*l.* to his niece, to be paid immediately after his decease if she should then be married, if not, the interest of such legacy to be paid her for life, to be calculated and paid to the day of her death or marriage; if she should die unmarried, the legacy to lapse for the benefit of the estate: and by codicil he gave her 200*l.* in addition; held that the additional legacy is to be raised out of the same funds and subject to the same conditions; and the legatee having married after testator's death is entitled. *Crowder v. Clowes*, Vol. 11. 449.

65. Devise of a trust estate by general words, but an intention appearing on the will inconsistent with that disposition, held not to pass. *Ex parte Morgan*, Vol. x. 101.

66. Where testator being seised in fee of estates, subject to his wife's jointure, by his will executed to pass land, gave an annuity to his wife for life, and several sums to his children, and appointed three persons, "as trustees of inheritance for the execution hereof;" *quare*, if the real estate passed to the trustees? *Trent v. Hanning*, Vol. x. 495.

67. Devise of general terms, of "all my copyhold lands held sufficient to pass all the copyhold estates surrendered or not." *Blunt v. Clitherow*, Vol. x. 589.

68. Republication of a will containing a general devise, after an estate contracted for, will pass it, and must be paid for out of the personal estate, provided a good title can be made. *Broome v. Monck*, Vol. x. 605.

So by a general devise or republication an equitable title passes. *Ibid.* 611.

69. A devise of land of inheritance in whatever form given is a specific devise, for devisor can only devise what he has, and he must have it at the date of the will, and continue to have it until his death. *Ibid.*

Quære, upon a bequest of money to be laid out in land in a particular parish, if land cannot be procured there, if it can be laid out elsewhere. *Ibid.* 610.

70. By pointing out a particular estate, a mode only is directed for executing the primary intention for a purchase. *Ibid.* 618.

71. Where a man has agreed to lay out money in land generally, and devises his real estate before such purchase is completed, the purchase money will pass to the devisee. *Id.* 613.

By such contract for purchase, if the vendor has a good title, the real estate becomes in equity the estate of the purchaser, and will pass by his will or descend, and either the devisee or heir may call for an application of the personal estate to the payment of the money. *Ibid.* 614.

72. Upon a bill filed for performance of a contract for the purchase of lands, sold at an auction, and also for an estate offered at a valuation, a decree was made upon the answer, admitting the contract, on condition of payment of the purchase money by a certain day, or the will to be dismissed. The money was paid on the day, held that such lands did not pass by a previous devise there being no binding contract, or option declared until the payment made. *Gaskarth v. Lord Lowther*, Vol. xii. 107.

73. Devise of real and personal estate to testator's son, his heirs, &c. when he shall attain 21 or marry before that age with consent, and in case of his marriage without such consent the real estate to be conveyed in strict settlement to him and his children, with limitations over of the personalty to daughters, held that the son having married without consent, under the age of 21, became absolutely entitled to the personal estate. *Austen v. Halsey*, Vol. xiii. 125.

74. Devise of estates in general words for payment of debts will include copyhold estates, though not expressly mentioned, and the want of a surrender will be supplied. *Kidney v. Coussmaker*, Vol. xii. 156. *S. P. Holmes v. Coghill*, Vol. xii. 216.

75. Where a testator becoming the absolute owner of funds devised to be laid out in land, bequeathed generally, "his money and lands:" held that in the absence of all evidence

of intention and there being funds to answer either description, the money so directed to be laid out on lands was to be considered as real estate. *Biddulph v. Biddulph*, Vol. xii. 161.

76. Devise of lands in trust to sell and divide the money amongst his three daughters, with survivorship, and until such sale to divide the rents and profits in the same manner, the daughters entered into possession, and no sale took place in their lifetime, and plaintiff entered as heir at law, upon agreement for sale by him, and bill for specific performance held, that the daughters having enjoyed the premises for two years it was too short to presume an election by them to take the estate devised as land, and that without some act, it must be considered as being in the state in which it ought to be. *Kirkman v. Miles*, Vol. xiii. 338.

77. Where the heir took stock devised to be laid out in land, as real estate, and treated it as personal property in several instances, held, that it passed under a bequest of all the rest and residue of his personal estate "either in possession or reversion" to his children. *Triquet v. Thornton*, Vol. xiii. 345.

78. Devise of estates for a term limited in trust, with powers to raise money to satisfy "the several legacies hereby given and bequeathed," to testator's children, and also the several other legacies herein-after bequeathed; the testator afterwards added a few trifling legacies, and by a codicil not attested directed certain sums to his children in addition, held that the latter could not be deemed to be well charged on the real estates, the Court could only marshal the assets. *Bonner v. Bonner*, Vol. xiii. 379.

79. Devise, on default of issue male, to the first daughter living at

the testator's death, who should attain 25, with remainder to her first and other sons in tail male, the surplus rents and profits after payment of debts, to accumulate until a son or daughter should come into actual possession under the limitations, who should then take such surplus rents and accumulation, held that a daughter living at the death of the testator having attained 21, was entitled to possession of the rents, &c. and to be paid the fund created by the accumulation. *Barker v. Barker*, Vol. XII. 409.

80. Devise in general terms sufficient to pass real as well as personal interests, unless intention to exclude appears on the face of the will, not necessary that the exclusion should appear by positive words. Devise to the first and other sons in tail male, and for default of issue to daughters and their heirs as tenants in common, and for want of such issue, to three nieces and their several and respective heirs as tenants in common; *Quære* as to cross remainders being implied between the nieces; a case was directed. *Green v. Stephens*, Vol. XII. 419.

81. Devise to testator's eldest son for life, with remainders in strict settlement, "and in default of such issue, remainder to the devisor's next heir at law;" held that it was a limitation of the reversion to his eldest son, and not a contingent remainder to such person as should be heir at law at the time of failure of such issue male. *O'Keefe v. Jones*, Vol. XIII. 413.

A limitation to a man for life, and then to his heirs at law, is a fee simple. *Ibid.*

82. Where the intention of the testator was explicitly declared, that the same person should enjoy certain premises devised, and the house,

furniture, &c. previously devised, and the devise as to the former failed, from defect of title in the testator and a misconception of his interest, held that the latter might yet be established. *Southey v. Lord Somerville*, Vol. XIII. 486.

83. The effect of a direction for an inventory held to be that the party could have only an interest for life, not the absolute property. *Ibid.* 493.

84. An annuity charged on an estate specifically devised, being void under the statute of mortmain, and expressly excepted out of the residue, held to sink for the benefit of the specific devisees. *Baker v. Hall*, Vol. XII. 497.

85. Devise of real estate to be sold as a fund for legacies, and an appointment of a "residuary executor," held that as to the surplus there was a resulting trust for the heir, who can only be disinherited by plain words of gift or necessary implication. *Berry v. Usher*, Vol. XI. 87.

86. Devise of real estate upon trust to sell; and in the first place, out of the proceeds pay off a mortgage, and then raise a specific sum as portions for testator's two daughters, and bequest of the personalty and residue after payment of debts, legacies, &c. to his wife absolutely, held that there being a clear intention to exonerate the personal estate from the payment of those two specific charges, it was exempt. *Hancox v. Abbey*, Vol. XI. 179.

87. In order to exonerate the personal estate from a mortgage debt there must be either express words or a plain intention. A devise to sell for payment of debts not sufficient. *Ibid.*

88. Devise of copyhold to testator's widow, upon trust to sell and vest in government securities, at

her discretion; and the interest and dividends given to the use of his said wife; held to be a resulting trust as to the capital for the heir, and not to pass by a subsequent bequest to her of "all his effects" whatsoever; upon full trust and confidence that she would distribute the same properly at her death among the testator's children, accounting for what they had already received; held also that she took an absolute interest in the latter bequest. *Wilson v. Major*, Vol. XI. 205.

89. Bequest of leasehold estate under the limitations in strict settlement, with power to sell and vest the proceeds in real estate to the same uses, held that such leasehold estates vest absolutely in the tenant in tail upon his birth, and that the power is void. *Ware v. Polhill*, Vol. XI. 257.

90. Devise in trust of a moiety for the separate use of testator's married daughter, so as not to be subject to the control of her then, or any future husband, remainder to her husband for life, remainder to children, &c.; the will also limited other shares in like manner to such of testator's unmarried daughters as the former, "so and in such manner that the same may be secured to his said daughters and their children, and not be subject to the control of any husband they may happen to marry; on the event of one of the unmarried daughters having married, and dying without issue, held that the husband surviving was not entitled to any interest in the moiety, the subject of the trust. *Judd v. Wyatt*, Vol. XI. 483.

91. A devisee having, by his undertaking to the testator, prevented an effectual charge, shall be subject to it in equity. *Mestaer v. Gillespie*, Vol. XI. 638.

92. So where a tenant in tail was prevented by fraud from suffering a recovery, meaning to give real interests by will to his wife, the estate was considered exactly as if such recovery had been suffered, even in favour of a volunteer. *Ibid.* 659.

93. Testator having limited his estates on the son of the elder brother A., and provided a fund for the maintenance and education of the heir apparent as the limitations should vest, and by will specified, that the son of a younger brother B. was to take such interest until the estates descended upon him, with a proviso, that such heir should take the principal, if any future possession should by recovery or other means bar the entail, and if such heir joined in that act, then the person, whose interest was barred, should take such principal. The event was, that by the American revolution the estates were confiscated, and A. had another son, who would have been next in remainder instead of the son of B., which last also died without issue, held that he was not entitled to the principal sum, but should receive the interest so long as his elder brother had no children. *Penn v. Barclay*, Vol. XIV. 122.

94. A limitation over to a second devisee, on condition of the first failing to execute a general release to the testator's executrix established, though the character of executrix and devisee were united, the first devisee, as heir at law, contesting the validity of the will. *Simpson v. Vickers*, Vol. XIV. 341.

95. Bequest of personal and real estate to testator's daughter in law, during her life, and his next heir to enjoy the same after her death, held that the words, during her life, must be applied to both subjects of the antecedent disposition,

and that the person answering the description of heir at law should enjoy the whole after her death. *Gwynne v. Maddock*, Vol. xiv. 488.

96. Plate, &c. devised to trustees as heir-looms, to go with the mansion-house, &c. which was devised in strict settlement, held that the absolute interest therein vested in the first tenant in tail, and upon his death under age passed to his personal representative. *Carr v. Lord Erroll*, Vol. xiv. 478.

Quere, if there be any difference between an executory trust by a will and a covenant in marriage articles as to such interests. *Ibid.* 487.

97. Devise of personal estate and of real estates to be sold for charitable purposes in Great Britain or Scotland, at the discretion of trustees, held void as to the latter, but valid as to the former bequest of residue, which the trustees had the option of laying out in land or public securities. *Curtis v. Hutton*, Vol. xiv. 537.

98. Bequest to the children of testator's brother, equally to be divided, and if any one should die under 21, his share to go to the survivors, held that it was a vested interest amongst such children as were living at the death of the testator, subject to be divested by their dying under 21, after-born children therefore excluded. *Davidson v. Dallas*, Vol. xiv. 576.

99. Proviso, that if any of the tenants for life, in a devise or executory trust to convey in strict settlement, shall become possessed of the family estate, the devise or limitation directed shall thereupon cease and become void, or not take effect, and the persons next in remainder under the said limitations or directions shall thereupon become entitled to the possession.

The first tenant in tail entitled

under the proviso, notwithstanding the descent of the other estate upon his father, the first devisee for life. *Stanley v. Stanley*, Vol. xvi. 491.

100. Devise to trustees and their heirs in trust to receive the rents, &c. until A. shall attain 21; and immediately after he shall attain 21 to convey to the use of A. for life, and from and after the determination of that estate by forfeiture or otherwise in his life to trustees and their heirs during his life upon trust to preserve the contingent uses; and after his decease to the use of his first and other sons in tail male; and for default of such issue, or in case of the death of A. before 21, upon a similar trust for other persons.

A. takes a vested remainder for life after an estate in the trustees for so many years as his minority may last. *Ibid.* 491.

101. Direction to trustees to correct any defect or incorrect expression in the will, and to form the settlement from what appears to them to be the testator's real meaning, does not authorise them to change the limitations. *Ibid.*

102. Devise by very general words, "all messuages, lands, &c., and all other his real and personal estate," included money in trust, to be invested in land, and settled, though particularly charged on the estates devised. *Green v. Stephens*, Vol. xvii. 64.

103. Distinction between a legal devise and an executory trust by will: in the latter, the actual intention, if it is to be collected, is regarded in a much greater degree than in the construction of a legal devise by the same instrument. *Ibid.* 76.

104. Devise to A. and her heirs for ever, "in the fullest confidence, that after her decease she will de-

visé the property to my family." *A.* has an estate for life only, with remainder in trust for the devisor's heir, as *persona designata*. *Wright v. Atkyns*, Vol. xvii. 255.

105. Execution of a devise under the statute of frauds, requiring signature by the devisor, in the presence of three witnesses, and their attestation of his act by their subscription. *Wright v. Wakeford*, Vol. xvii. 458.

Attestation of a devise by a mark, good within the statute of frauds. *Ibid.* 459.

106. Sealing not necessary to the execution of a devise under the statute of frauds; nor sufficient without signing. *Ibid.* 459.

107. Devise to *B.* after the death of *A.* (*B.* being the heir at law), a necessary implication for *A.* for life. *Dashwood v. Peyton*, Vol. xviii. 40.

108. Devise by implication from the mere recital of an erroneous conception of right, as to an implied election, the will imposing an express election in favour of another person, *Quere*. *Dashwood v. Peyton*, Vol. xviii. 27.

109. Devise in remainder to "the said *T. B.* for life;" and after his decease, to "the said *T. B.*, son of my nephew *S.*," and his heir *A.*, nephew of the same name, "*T. B.*," not being before mentioned, and in every other instance the devisee being pointed out by reference and particular description of the degree of relationship, the great nephew held to be intended in both limitations. *Chambers v. Brailsford*, Vol. xviii. 368.

110. Entry of the devise, having also a mortgage, presumed to be as devisee, if no trace appears of any of the steps usually taken by a mortgagee to get into possession. *Forbes v. Maffat*, Vol. xviii. 393.

111. Under a devise of "all my

real property," copyhold estate passed to the devisee and his heirs. *Nicholls v. Butcher*, Vol. xviii. 193.

112. Distinction extremely nice, perhaps not of easy application, between a charge on a devised estate, to be created by the act of another, and a charge created by the devisor; to the extent of that charge, the intention appearing on the face of the will, not to give to the devisee. In the former case, the heir has no claim; in the latter, the particular object failing, he takes to the extent of the charge. *Sidney v. Shelley*, Vol. xix. 363.

113. Question on execution of a devise to be determined by a jury, if the heir insists on an issue, although all the three witnesses speak to the sanity of the devisor. *Bootle v. Blundell*, Vol. xix. 500.

114. The course upon a bill to establish a devise, is an issue, for the satisfaction of the Court. *Ibid.* 501.

115. Distinction between ejectment and issue *devisavit, vel non*, upon which this Court looks at the whole record, and requires all the witnesses to be examined; who are the witnesses of the Court, not of the parties. *Ibid.* 509.

116. Where it was impossible to ascertain the mistake in a devise, the name belonging to one, the description to another, it was held void for uncertainty. *Careless v. Careless*, Vol. xix. 604.

Ante, Vol. xviii. 368.

117. The decree in favour of the great nephew, as devisee of the Lincolnshire estate, affirmed on appeal. *Chambers v. Brailsford*, 652.

118. Latent ambiguity under a devise, where there are two persons of the name; and evidence is admissible: not, if it appears on the will who was intended. *Ibid.* Vol. xix. 654.

119. Different devises in the same

will not be affected by the circumstance, that the devisees are in the same relation to the devisor, unless there are words by grammatical construction connecting the two devisees, or the same object, is stated as to both. *Chambers v. Brailsford*, Vol. XIX. 655.

And see TENANT IN TAIL, 18.

DISCLAIMER.

A defendant cannot get rid of a disclaimer without a strong case on affidavit. *Seton v. Slade*, Vol. VII. 265.

DISCHARGE.

1. A party charged by his answer or examination, cannot discharge himself by it, unless the whole is stated as one transaction; as, that on a particular day he received a sum, and paid it over: not, that upon a particular day he received a sum, and on a subsequent day he paid it over. *Thompson v. Lambe*, Vol. VII. 587.

2. Charge by admission discharged only by shewing the application immediate on the receipt of the money, as one transaction; not by distinct independent items on the other side of the account. *Robinson v. Scotney*, Vol. XIX. 582.

DISCOVERY.

And see ACCOUNT, 5.—DEMURREB, 7, 9, 10, 12, 13.—FRAUDS, STAT. OF, 12.—PLEADING, 12. 27, 28. 61.—PRACTICE, [N.] 3, &c.

1. Bill of discovery in aid of an action of covenant: plea—a clause in the articles, that any dispute should be referred; over-ruled, discovery being of course, whilst an action is brought and can be main-

tained. *Mitchell v. Harris*, Vol. IX. 129.

And see AWARD, 21.

2. Mortgager of the unsettled part of an estate must discover the boundaries. *Strode v. Blackburn*, Vol. III. 225.

3. Pawnee of a bailee must discover, so as to enable the owner to bring an action. *Ibid.* 226.

4. When discovery is sought in order to obtain the relief prayed, that which is good to the relief is good as to the discovery also. *Baker v. Mellish*, &c. Vol. X. 553.

5. Upon a bill of discovery in aid of an action for penalties under the stockjobbing act, held that it was confined to the cases under the sections in which the protection was given. *Bullock v. Richardson*, Vol. XI. 373.

6. Where party answers as to part of the discovery, he is compellable to answer as to the rest. *Quere*, If he could refuse it by insisting that he was not bound to answer. *Dolder v. Lord Huntingfield*, Vol. XI. 283.

S. P. Faulder v. Stuart, *Ibid.* 296.

—*Shaw v. King*, *Ibid.* 303.

7. Where the bill and plea stated a transfer of stock to satisfy a deficiency in the accounts of a banker's clerk, and other facts, amounting to a case of an individual charged with a felony, and an agreement between other persons, the object of which is to prevent a prosecution, held that it was a conspiracy amounting to an offence, and that defendants might protect themselves from discovering any fact that might form a link in the chain. *Claridge v. Hoare*, Vol. XIV. 59.

8. *Quere*, If such bill were not demurrable: such a plea does not require the support of an answer. *Ibid.*

DONATIO.

9. Plaintiff in a bill for discovery pays the costs. *Butterworth v. Bailey*, Vol. xv. 361.

DISTRIBUTION.

And see *HOTCHPOT*, 1.

Distribution *per stirpes et per capita*. *Royle v. Hamilton*, Vol. iv. 437.

DOMICIL.

1. The succession to the personal estate of an intestate is regulated by the law of that place, which was his domicile at the time of his death. For that purpose there can be but one domicile; and the *lex loci rei sitæ* does not prevail. *Somerville v. Lord Somerville*, Vol. v. 750.

2. The mere place of birth or death does not constitute the domicile. The domicile of origin, which arises from birth and connections, remains, until clearly abandoned, and another taken. *Ibid.*

3. In the case of Lord *Somerville*, of two acknowledged domicils, the family seat in Scotland, and a leasehold house in London, upon the circumstances, the former, which was the original domicile, prevailed. *Ibid.*

4. A man may have two domicils for some purposes. *Ibid.* 786.

5. Distinction upon cotemporary domicils: in the case of a nobleman or gentleman, generally, the domicile is the mansion house in the country; that of a merchant is at his residence in town. *Ibid.* 789.

6. A new domicile cannot be acquired during pupillage. *Ibid.* 787.

DONATIO CAUSA MORTIS.

And see *GIFT*, 1.

1. Issue directed to try whether

DOWER.

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there was *donatio causa mortis*, because it did not appear to have been in the last illness. *Blount v. Burrow*, Vol. i. 546.

2. An absolute gift to take effect immediately, cannot be considered such; as of a check on a banker, payable to bearer, and of a promissory note, nor considered an appointment or disposition in nature of it, and not capable of any greater effect in equity than at law. As to the check, the bill was dismissed without prejudice to any action, as to the note, it being doubted whether any action would lie against the executor for want of consideration, Court offered to retain the bill, if an account was necessary. *Tate v. Hilbert*, Vol. ii. 111.

3. *Semble*, The description by Swinburne of *donatio causa mortis* is incorrect, it being in the nature of a legacy, liable to debts, and only a gift on survivorship. *Ibid.*

4. It cannot be by mere parol, doubtful whether it may be by deed or writing. *Ibid.* 120.

Bill upon a banker expressly for mourning, is an appointment of the money for a particular purpose in writing, necessarily supposing death, and therefore probate not necessary. *Ibid.* 121.

DONATIVE.

Qualities of a donative. *Attorney General v. Marquis Stafford*, Vol. iii. 80.

DOWER.

And see *MORTGAGE*, 15.—*NAVIGATION SHARES*.—*PARTITION*, 5.—*SATISFACTION*, 7.

1. If right to dower be contro-

verted, it must be made out at law; if it be not, this Court has a concurrent jurisdiction. When, therefore, to a bill for dower and arrears since the death of husband, defendant demurred, and by answer admitted the right, and stated an offer to assign it, and of arrears since claim made, demurrer was over-ruled. *Mundy v. Mundy*, Vol. II. 122.

2. To compel a widow to elect to take under a will or dower, her claim to dower must be inconsistent with the will. *Strahan v. Sutton*, Vol. III. 249.

3. Devisee dies in the life of the deviser, and the estate descends: the deviser's widow being entitled, by the will, to a provision in bar of dower, must elect. *Pickering v. Lord Stamford*, Vol. III. 337.

4. A tenant in tail, with power to lease, remainder to *B.*, wife of *C.*, in tail, conceiving himself to have obtained the fee under a void execution of a power, made leases exceeding his power; reciting, that he was seised of the freehold and inheritance, and covenanting for quiet enjoyment against any act or default of himself or those claiming under him. *A.* devised the said estates and others to *B.* for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons, and to *D.* and his first and other sons successively, in the same manner; and gave to *B.* and *C.* other benefits by his will; and gave the residue to *D.*, who filed a bill to have the will established. *B.* elected to take her estate tail in opposition to the will, which the Master reported to be for her benefit. After her death *C.*, who had taken under the will, claimed as tenant by the curtesy, and brought ejectments against the lessees, some of whom had expended considerable

sums upon their tenements. Upon bills by *D.* and the lessees, the Lord Chancellor was of opinion, as to the form of *D.*'s bill, there was great weight in the objection, that the whole was arranged in the former cause; and if there was any omission in the decree, that was not the subject of an original bill. As to the merits, that though the assets of *A.* would be liable to the lessees upon eviction, the benefit of putting a party to election does not extend to a residuary legatee; and that neither *D.*, as a disappointed devisee, nor *a fortiori* the lessees, could raise that equity against *C.* holding as tenant, by the curtesy under the election that *B.* had made, to take her estate tail against the will of *A.* The bill of *D.*, therefore, was dismissed, and that of the lessees retained, in order, that when they should have ascertained their damages, they might have satisfaction from the assets of *A.*, part of which had been received under his will by *C.* *Earl of Darlington v. Pulteney*, Vol. III. 384.

5. A provision previous to the marriage of a female infant in bar of dower, thirds, and all claim upon the personal estate of the husband, if precarious and uncertain, as, that the personal estate shall go according to the custom of London, does not bar her. *Smith v. Smith*, Vol. v. 189.

6. Dower established against assignees under a joint commission of bankruptcy upon the estates purchased with the partnership fund, but conveyed to one partner under a specific agreement, that the estates should be his, and he should be debtor for the money. *Ibid.*

7. A widow not put to election between her dower and an annuity by the will of her husband. For the claim of dower must be incon-

sistent with the will. *Greatorex v. Cary*, Vol. vi. 615.

8. A purchaser cannot protect himself against a claim of dower by a term attendant upon the inheritance, unless he has procured an assignment. *Maundrell v. Maundrell*, Vol. vii. 567. *Post Pl.* 15.

9. Husband having a power of appointment, paramount the right of dower, in default thereof to himself for life, remainder to his right heirs, if the power could have effect, yet a purchaser taking by a conveyance adapted to pass the interest in the estate, as a limitation of the fee, was held to take in that way, not by way of appointment, and therefore subject to dower. *Ibid.*

10. At law all terms are considered as terms in gross; and, therefore, without regard to the purpose, prevent a dowress from any legal benefit from recovery in dower; for she recovers with stay of execution during the term. But equity regards the purpose for which the term is created and subsists; and if only for the benefit of the owner of the inheritance, it is considered part of the inheritance: not absolutely merged, but so attendant as to accompany it and every right and interest growing out of it by operation of law or agreement. Not to be used, therefore, against the owner of the whole or any part of the inheritance: every description of ownership having a use in the term commensurate with the interest in the inheritance. When dower arises therefore, the term in a proportion is as much attendant upon that interest, as during the husband's life, upon the inheritance; and protects it against either heir or purchaser. *Ibid.* 577.

11. Account decreed for twelve years from the death of the husband, there being no limitation in equity

any more than at law as to arrears, without a special ground. *Oliver v. Richardson*, Vol. ix. 222.

12. Dower prevented by conveyance to such uses as a man should appoint, and for default of appointment to himself in fee. *Ibid.* 263.

13. Provision by will in bar of dower and thirds, is not barred from taking under an intestacy by the failure of a legacy; but that will not apply to a marriage agreement. *Ibid.* Vol. x. 18.

14. Provision under a covenant in a settlement is an implied bar of dower. *Ibid.* 20.

And see ACCOUNT, 4. 8.

15. A purchaser, in order to avail himself of an outstanding term against dower, must have procured an assignment or declaration of trust, or obtained possession of the deed creating the term. *Maundrell v. Maundrell*, Vol. x. 246.

See BARON and FEME [C.] 12.

DURESS.

Compromise with a man in gaol, though not at the suit of the party with whom it is made, not allowed to stand. *Wilkinson v. Stafford*, Vol. i. 43.

EAST INDIA COMPANY.

And see FRAUD, 19.

1. East India Company have neither an independent nor delegated sovereignty; but are mere subjects. *Nabob of Carnatic v. The East India Company*, Vol. i. 390.

2. By law of the East India Company, requiring a discovery by answer to a bill in equity as to transactions upon which penalties were imposed, confined to the case of a bill by the company. *Paxton v. Douglas*, Vol. xvi. 239.

ECCLESIASTICAL PERSON.

And see CURACY.

1. An agreement in 1800 for a lease of a farm to a clergyman for the purpose of occupation, is void under the statute 21 Hen. 8. c. 13. *Morris v. Preston*, Vol. VII. 547.

2. Whether a clergyman buying a lease, as property, or taking it by devolution of law, as next of kin, &c. is within the statute 21 Hen. 8. c. 13. *Quære. Ibid.* 556.

See WARD OF COURT, 11.

3. In the Ecclesiastical Court, a party coming in and doing an act himself, puts an end to a power given to another to act for him. *Heyes v. Exeter College*, Vol. XII. 346.

EJECTMENT.

And see MESNE PROFITS.

1. Upon an ejectment by an heir in tail, the defendants cannot rest upon the judgment in the recovery, but all the proceedings must appear upon the record. *Lady Shaftesbury v. Arrowsmith*, Vol. IV. 71.

2. An ejectment cannot be brought without leave of the Court, where the receiver is in possession. *Angel v. Smith*, Vol. IX. 335.

ELECTION PETITION.

Party presenting and attending a petition to the House of Commons, cannot, by setting up the engagement of another person, deliver himself from the expense of his own suit. *Wallis v. Duke of Portland*, Vol. III. 500.

ELECTION.

And see BARON AND FEME [C.] 23: 298.

[E.] 3.—COPYHOLD, 24, 25, 26.—
—DEVISE, 71. 103.—DOWER—
passim.

1. It is a motion of course to put a party to his election at law or in equity. *Anon.* Vol. I. 91.

2. Husband devised all his real and personal in trust for his wife for life, provided she should not marry, and made her executrix. Trustee not acting, she took possession, and receiving rents and profits for five years, not allowed to elect to take a sum under the marriage settlement, without special ground, shewing, that from the situation of the property, it was doubtful what would be the result. A party having a right of election may file a bill to have the property cleared, so as to elect to advantage. *Butricke v. Broadhurst*, Vol. I. 171.

3. Question, whether testator intended legatee should give up a legacy under the will of another testator, or considered it as given up; legatee entitled to both; the intent not being sufficiently made out to compel election. *Baugh v. Read*, Vol. I. 257.

4. Election to take under or in opposition to a will can only be compelled upon something in the will, not *dehors*. *Stratton v. Best*, Vol. I. 285.

5. Wife entitled under bond by the husband upon the marriage to a sum payable three months after his death for her for life, then for the children; if none, for her absolutely: by will he gave all real and personal he then had, or might die possessed of, upon trust to pay her the rents and interest for life; then the whole equally to the children, if none over, and revoked all former settlements and wills. There were no children. Widow entitled to both. *Forsight v. Grant*, Vol. I.

6. Widow put to election to take under the will of her husband or dower, notwithstanding great disproportion. Receipt of a legacy and annuity under the will for three years did not prevent her right of election, being presumed not to have acted with full knowledge, which would bind her. *Wake v. Wake*, Vol. 1. 335.

7. Tenant in tail of a rent-charge under settlement, being also devisee in strict settlement of the estate charged with it, put to election *Blake v. Bunbury*, Vol. 1. 514.

8. Devisee cannot disappoint the will, even if it disposes of his property; but must either convey according to the devise, or renounce the benefit of it *pro tanto*: so if he is an incumbrancer upon the estate directed by the will to go free from incumbrance, he must elect: but the intent must appear by declaration plain or necessary inference. *Ibid.* 523.

9. Election never but upon presumed intent. *Crosbie v. Murray*, Vol. 1. 557.

10. Election can only exist, where a person has a decided interest, and something is left him by will. *Ibid.* 561.

11. Parties taking under a will executing a power of appointment, dispute part of it; there being no fund but the one to be appointed, it is not a case of election. *Bristow v. Warde*, Vol. 11. 336.

12. Testator appoints to grandchildren, under a power to appoint to children, and a fund to go equally on default of appointment: the appointment being had, the children having legacies must elect. *Whistler v. Webster*, Vol. 11. 367.

No person bound to elect without a clear knowledge of the funds. *Ibid.* 371.

13. Land devised by will not

duly executed; the heir having a legacy upon express condition not to disappoint the will, must elect. *Ibid.*

14. Testator disposes of the estate of another, who has some interest under the will: he shall not take that, unless he gives up his estate to that amount. *Ibid.* 372.

15. *A.* tenant in tail with power to lease, remainder to *B.*, wife of *C.*, in tail, conceiving himself to have obtained the fee under a void execution of a power, made leases exceeding his power: reciting, that he was seised of the freehold and inheritance, and covenanting for quiet enjoyment against any act or default of himself or those claiming under him: *A.* devised the said estates and others to *B.* for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to her daughter and her first and other sons, and to *D.* and his first and other sons, successively in the same manner; and gave to *B.* and *C.* other benefits by his will, and gave the residue to *D.*, who filed a bill to have the will established: *B.* elected to take her estate tail in opposition to the will, which the Master reported to be for her benefit. After her death *C.*, who had taken under the will, claimed as tenant by the curtesy, and brought ejectments against the lessees, some of whom had expended considerable sums on their tenements. Neither the lessees nor *D.* are entitled to stop the ejectments, or to put *C.* to his election; but an injunction was granted on their undertaking to bring on their causes the following term. *Lady Cavan v. Pultney*, Vol. 11. 544.

16. The equity to compel election distinguished from an express condition. *Ibid.* 560.

17. A widow cannot be put to election to take under the will of her husband or her dower, except by express declaration or necessary inference from the inconsistency of her claim with the dispositions of the will. *French v. Davies*, Vol. II. 572.

18. Party claiming under an instrument must claim under the whole. *Wilson v. Lord John Townshend*, Vol. II. 696.

19. Election applies to interests of married women, whether immediate, remote, contingent, of value or not, real or personal. *Ibid.* 697.

20. A party bound to elect between two funds, having mortgaged one, elects the other: the former must be taken, subject to the mortgage, but shall be reimbursed by the latter. *Rumbold v. Rumbold*, Vol. III. 65.

21. A person entitled under a will, and also paramount and against it, must elect. *Wilson v. Mount*, Vol. III. 191.

22. Where a testator, conceiving himself entitled to the property of another person, makes a general disposition of all his estate, and gives some benefit to that person, he must elect. Therefore, a husband conceiving himself entitled, under a void deed, to a residue bequeathed to his wife, and dying without getting possession, having made such a general disposition by a will, under which she took an interest, it is a case of election; and her election to take the provision under the will, which, though less in point of value, was to her separate use, was established against the assignees under the bankruptcy of her second husband. *Rutter v. Maclean*, Vol. IV. 531.

23. Testator made a provision for his wife; and gave a sum of money in trust for the separate use of a

daughter, and after her death to divide the principal equally between her children and their issue at twenty-one; if none such, to his son, whom he made residuary legatee. Then, after similar, but unequal provisions for his other children, he declared, that the provision in the will for his said wife and their said children was in satisfaction of all right, claim, &c. which she or they, or any or either of them could set up, &c., or which she and they would be entitled to under his marriage articles: and if his said wife and children, or either of them, should refuse, &c. he revoked the legacy and bequest therein contained, to the use and benefit of such one or more of them, his said wife and children, who should refuse or decline to execute such release or discharge, and declared the same void as to such one or more of them who should so refuse, as though he had died intestate. A child electing to take under the articles forfeits the life interest, which falls into the residue; but the children of such child are not bound by the election, and liberty was given to apply on the death of the parent. *Ward v. Baugh*, Vol. IV. 623.

24. Parties having claim under and against a will must elect. *Wollen v. Tanner*, Vol. V. 218.

25. Whether the infant issue of tenant in tail was bound by the election of his parent, *Quære*. *Long v. Long*, Vol. V. 445.

26. Election decreed between two claims under and against a will. *Blount v. Bestland*, Vol. V. 515.

27. If a testator by will gives 2000*l.* a-year by way of jointure to any woman he might marry, and after marriage, by a codicil, gives his wife the same jointure, she cannot claim both. *Osborne v. Duke of Leeds*, Vol. V. 382.

28. In a case both of election and satisfaction by the will of a parent as to two subjects of claim by his younger children under a settlement, a case of election was raised as to a third subject, stock vested in trustees, upon the construction of the will. *Pole v. Lord Somers*, Vol. vi. 309.

29. The heir claiming under a will, and against it a copyhold estate unsurrendered, put to his election. *Pettward v. Prescott*, Vol. vii. 540.

30. No election against an heir at law claiming under a will, and also against it a real estate, for want of a due execution according to the statute, unless an express condition is annexed. *Sheddon v. Goodrich*, Vol. viii. 481.

31. Election takes place when one legatee under a will insists upon something by which he would deprive another legatee under the same will, of the benefit to which he would be entitled if the first legatee permitted the whole will to operate. *Andrews v. Trin. Hall, Cambridge*, Vol. ix. 533.

32. The doctrine of election reaches the customary heir claiming copyhold for want of a surrender. *Blunt v. Clitherow*, Vol. x. 591.

Where testator devised his real estates to certain uses, and afterwards disposed of the residue, directing it to be laid out in land to be settled to other uses, and subsequently entered into a contract for the purchase of an estate, which, by a codicil, the testator directed to go to the like uses as his other real estates; held, that if the title prove defective, and purchase cannot be completed, that the devisee cannot claim the amount of the purchased money out of the personal estate, or another estate purchased with it. *Broome v. Monck*, Vol. x. 597. 611.

33. Election is where the testator gives what does not belong to him, but does belong to some other person, and gives that person an estate of his own; whereby a condition is implied, either that he shall part with his own estate, or shall not take the bounty. *Ibid.* 609. 616.

34. After decrees in original causes, deciding, in effect, that the real estates were devised for payment of debts, which turned out insufficient, and afterwards the creditors claimed an estate devised to the wife for life, to make a provision for her in lieu of dower, held that her former election, as being made under a mistaken impression that the creditors were not to make any claim upon those estates, was not binding upon her; but that she must now be let in to any of her legal rights, and have an inquiry on what estates of the testator she was entitled to dower or free bench. *Kidney v. Coussmaker*, Vol. xii. 136.

35. The doctrine of election does not apply to the case of creditors taking a benefit under a devise for payment of debts; under a charge of debts and legacies, creditors to be paid in preference to legatees: and though the statute of fraudulent devises would prevent a devise for payment of legacies, so as to disappoint specialty creditors, it would not prevent a devise for payment of debts generally, though the effect would be to let in simple contract creditors, to the prejudice of specialty creditors. *Ibid.* 154.

36. Devise in general words of "all the rest, residue, and remainder of my real and personal estate and effects whatsoever and wheresoever, and of what nature and kind soever;" held not sufficiently denoting an intention to pass copyhold estates, not surrendered, to compel

the heir, one of the residuary legatees, to elect. *Judd v. Pratt*, Vol. XIII. 168.

37. Circumstances may be admitted to shew the property, the subject of disposition, but not to shew the intention of the testator. *Ibid.* 174.

38. So, though it appeared that the freehold and copyhold lands were intermixed. *Ibid.*

39. There is a distinction in favour of creditors, wife, or children, when a different construction shall be given, as persons to whom such an intention may be held to apply. *Ibid.* 176.

40. Where testator directed all contracts for the purchase of lands which he might leave incomplete at the time of his death, should be carried into execution, and the monies paid out of his personal estate, held that it was a complete case of election as against the heir, who had legacies and bequests under the will. *Thelluson v. Woodford*, Vol. XIII. 209.

41. The ground of election is the implied condition upon intention; that he shall not take both, though upon mistake in the testator. *Ibid.* 220.

42. Devise by raising a case of election expressly, or by clear implication. *Dashwood v. Peyton*, Vol. XVIII. 41.

Devise to the heir after the death of the deviser's wife, a necessary implication that the wife shall take for life; but no implication for her upon such a devise of another man's estate, through the medium of election. *Ibid.* 48.

Principle of election: giving a right, not to the thing itself, but to compensation out of something else. *Ibid.* 49.

43. Plaintiffs suing for equitable

relief, part of which only could had at law, not entitled to elect; can proceed at law only by leave of the Court. A receiver appointed at his instance, who, though his ficer, ought, as indifferent, to strain him, not aided by an order for liberty to distrain, without undertaking to proceed no farther at law. *Mills v. Fry*, Vol. X. 277.

44. Distinction, upon election, between a deed and a will; whether in the latter case, the principle of forfeiture or compensation of *Quere.* But upon election against a marriage settlement, as upon a contract, an injunction granted on the principle of forfeiture. *Green v. Green*, Vol. X. 665.

45. Devise to a son, recommending him to continue his cousins and B., in the occupation of their respective farms, in the county of W., as heretofore, and so long as they continue to manage the same in a good and husbandlike manner and to duly pay their rents. A trust for the cousins, who had been tenants at will; and the son being heir, was put to his election. *Tilley v. Tibbits*, Vol. XIX. 650.

As to the effect of election against the will, whether compensation or forfeiture, *Quere.* 1 656.

Right of election barred by quiescence. *Ibid.* 662.

Origin of election in the common law. *Ibid.* 663.

46. Election upon a deed. *Green v. Green*, Vol. XIX. 665.

ENABLING STATUTES.

See LEASE, 4.

EQUITABLE RECOVERY.

1. An equitable recovery will not bar a legal estate. *Philips v. Brydges*, Vol. III. 125.

A legal estate in the equitable tenant to the *præcipe*, is no objection to an equitable recovery. *Ibid.* 126.

2. Devise to trustees and their heirs in trust to receive and pay over rents and profits to *A.*, a feme covert, for life, for her separate use, and after her decease to convey to her daughters as tenants in common in tail, remainder over. *A.* takes an equitable estate for life, and may by lease and release make a tenant to the *præcipe* for an equitable recovery: each daughter takes a vested estate, when she comes in esse, subject to be divested as the number increases; the conveyance in execution of the trust need not wait the death of *A.* *Barnaby v. Griffin*, Vol. III. 266.

3. Analogy between legal and equitable recoveries. *Ibid.* 276.

4. Equitable estates barred by equitable recovery if there is an equitable tenant to the *præcipe*. *Wykham v. Wykham*, Vol. XVIII. 418.

5. Equitable estate in remainder, though united with legal fee in trust to secure the limitations, barred by an equitable recovery. *Ibid.* 418.

6. Equitable recovery, when nothing but equitable interests interposed between the legal estate and the ulterior equitable interest. *Ibid.* 419.

7. Equitable recovery valid; though the tenant in tail was not at the time in actual receipt of the rents; which the trustee paid over to others under a decree, afterwards reversed. *Lord Grenville v. Blyth*, Vol. XVI. 224.

8. No analogy between legal and equitable recovery with reference

to possession with, or adverse to, the title. *Ibid.*

To make a legal tenant to the *præcipe* possession by seisin in fact or law is absolutely necessary; otherwise no legal freehold is acquired: but in the other case, as it is not the object, nor can ever be the effect, of the conveyance to transfer the possession, but only to pass the equitable interest, if he has a sufficient equitable interest, viz. an equitable estate tail, the recovery is well suffered. *Ibid.* 230.

And *vid. infra*, EQUITABLE ESTATE, 2.

EQUITABLE ESTATES.

1. A limitation creating an entail at law will have the same effect upon an equitable estate; therefore a devise in fee to pay debts, and then to the use of *A.* in trust for *B.* for life, remainder to the heirs male of his body, is an estate tail in *B.* *Brydges v. Brydges*, Vol. III. 120.

2. To create a merger of the equitable in the legal estate by their union, the interest in each must be the same: an equitable recovery therefore barred an equitable remainder in tail in the person who had the legal fee. *Ibid.* 120.

Analogy between legal and equitable estates. *Ibid.* 127.

3. Devise to trustees, in trust to sell and purchase other estates to be settled. Those entitled under the limitations directed of the estates to be purchased, have equitable interests co-extensive, until a sale. Therefore a specific performance was decreed of an agreement for partition against an objection to a title under a fine, by a person who would have been tenant in tail of the estates to be purchased, the effect being an election to keep the

estate, binding the trustees; though it may be questionable whether they could take upon themselves to convey in fee to a person entitled to an estate tail only. *Pearson v. Lane*, Vol. xvii. 101.

4. Money given to be laid out in land to be conveyed, or land to be sold, and the produce paid to *A.*; though in one case the money is not given to him, and in the other no interest expressly in the land, he is in equity the owner, and may elect to have the money, or the land conveyed as he shall direct. *Ibid.* 104.

ERROR.

Writ of error generally stays execution in civil cases, not in criminal. *Huguenin v. Baseley*, Vol. xv. 180.

ESCHEAT.

And see COPYHOLD, 1.—DEVISE, 55.

1. Order upon petition for leave to traverse an inquisition upon a commission of escheat, found in favour of the crown. *Ex parte Webster*, Vol. vi. 809.

2. The ordinary rule for the crown to give a lease to the party discovering an escheat. *Moggridge v. Thackwell*, Vol. vii. 71.

ESTATE.

And see ASSETS.—DEBTS.—EXONERATION.

1. As between real and personal representatives, their rights are purely legal, neither has any equity to convert the property, but chance decides between them. Intention

ESTATE FOR LIFE.

of testator is a consideration for devisees. *Walker v. Denne*, Vol. ii. 170.

2. Upon a contract by lessor for liberty to purchase the fee within a certain period at a limited price, the rule is that from the death of the lessor until the option made, the rent goes to the heir, but the money after the purchase was claimed, to the executor. *Townley v. Bedwell*, Vol. xiv. 591.

ESTATE TAIL.

And see TENANCY IN TAIL.

1. Originally an estate tail was an estate upon condition, to become a fee upon issue had, for the purpose of alienation, but not absolutely; as if not aliened, it descended *per formam doni*. *Allan v. Allan*, Vol. xv. 137.

2. No formedon for the issue in the life of the tenant in tail. *Ibid.*

3. Devise to *A.* and after his death to his first and other sons, and in default of male issue then unto his eldest and other daughters to their heirs male for ever: an estate in tail male in *A.* *Wight v. Leigh*, Vol. xv. 564.

ESTATE FOR LIFE.

And see TENANCY FOR LIFE.

1. The true ground of inference for tenant for life paying off incumbrance is the scantiness of his estate; as *prima facie* he cannot be intended to discharge the estate of another; and it arises as much, where the estate goes unalienably in one direction, as when alienable. *Countess of Shrewsbury v. Earl of Shrewsbury*, Vol. i. 234.

ESTATE FOR LIFE.

2. Tenant for life let into possession on consent and giving security to pay charges payable out of rents and profits, and to keep down interest of the fund to answer contingent charges. *Blake v. Bunbury*, Vol. 1. 514.

3. Tenant for life exonerated by the assets of a preceding tenant, who received the money upon a mortgage, in which they joined. *Finch v. Finch*, Vol. 1. 535.

4. Tenant for life is only to keep down the interest of an incumbrance, but not to be charged with any part of the principal. *Countess of Shrewsbury v. Earl of Shrewsbury*, Vol. 1. 234.

5. Tenant for life has no property in the underwood, till his estate comes into possession; he cannot therefore have an account of what was cut wrongfully by a preceding tenant. *Pigot v. Bullock*, Vol. 1. 479.

6. Tenant for life without impeachment of waste, cannot maintain trover for timber severed during a prior estate, but it vests immediately in the owner of the inheritance. So tenant for life impeachable as to underwood. *Ibid.* 484.

7. Devise of "my copyhold estate at P. consisting of three tenements, and now under lease," &c.: but not specifying for what interest: an estate for life only passes. *Pettiward v. Prescott*, Vol. VII. 450.

8. Trust by will as to the residue of real and personal estate for a nephew and his heirs, to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit to advance him; when it may be in their power, any part of the principal for his advancement in life, that they will not withhold such assistance as they may deem necessary: but, in case no part should be advanced,

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the residue to be divided among the nephew's issue; with a limitation over, if he should leave no issue.

The nephew is entitled, not to the absolute property, but for life only; and, no advancement having been made, an inquiry was directed, whether his circumstances required advancement. *Robinson v. Cleator*, Vol. xv. 526.

9. Implication of an estate for life from a devise after the death of a person to one of two co-heirs of devisor. *Dyer v. Dyer*, Vol. XIX. 614.

ESTATE PUR AUTER VIE.

1. An interest in an estate *pur auter vie*, that would be an estate tail, if applied to freehold lands of inheritance, may be disposed of by deed. Vol. VI. 158.

2. An estate *pur auter vie* may be limited in tail. Vol. VI. *Ibid.*

3. The interest in an estate *pur auter vie* to a man, his executors, administrators, and assigns, beyond the debts, belongs to those, who are entitled to the personal estate. The executor was therefore held a trustee for the residuary legatees. *Ripley v. Waterworth*, Vol. VII. 425.

4. Tenant *pur auter vie* made a lease for years; and died during that lease, living the *cestui que vie*. The lessee for years would take the estate itself. *Ibid.* Vol. VII. 442.

ESTATE FOR YEARS.

Leases for years protected by statute 21 Hen. 8. c. 15, from the operation of a recovery. *Cooper v. Denne*, Vol. I. 567.

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EXAMINATION OF WITNESSES.

And *see* EVIDENCE, [F.]—PRACTICE.

1. Order after publication for liberty to take out a commission, and examine witnesses by general interrogatories as to the credit of a witness, who had been cross-examined, and as to such particular facts only as are not material to what is in issue in the cause. *Wood v. Hamerton*, Vol. ix. 145.

2. Power of the Court of Chancery to examine *vivâ voce*. *Turner v. Burleigh*, Vol. xvii. 354.

3. Re-examination not of course, but at the discretion of the Court, on special application. *Purcell v. M'Namara*, Vol. xvii. 434.

Order for the examination of a defendant upon interrogatories, who had been examined and cross-examined; restrained to such of the points in the cause to which she had not been examined, as the master should think reasonable. *Ibid.* Vol. xvii. 434.

4. Interrogatories for examination of a party, settled by the master. *Ibid.* Vol. xvii. 434.

5. Examination *de bene esse* granted to plaintiffs in a bill to perpetuate testimony after *subpœna* served, but before appearance of infant defendants, in contempt by the messenger's return, that they had absconded and were not to be found, on affidavit of the materiality of the evidence and danger of its loss, and undertaking to proceed with all due diligence to issue and examination in chief, to be proved before publication of the depositions *de bene esse*. *Frere v. Green*, Vol. xix. 319.

6. Examination *de bene esse* not extended beyond the cases of a

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single witness, the age of 70, and dangerous illness, to a prisoner, charged with a capital felony. *Anon.* Vol. xix. 321.

7. Examination to points not in issue of no effect. *Willan v. Willan*, Vol. xix. 600.

8. Commission to examine witnesses abroad executed and returned; the defendant, who had not interrogatories prepared, not having had the opportunity of cross-examining. A new commission granted for that purpose, the defendant to state, whom he wishes and undertakes to cross-examine; but the plaintiff's depositions not suppressed. *Campbell v. Scougal*, Vol. xix. 552.

9. Commissioners for examination of witness are to act impartially; though to a certain extent they have under their particular care the interest of the party appointing them. *Ibid.* 553.

10. As to the modern practice in country causes to supply interrogatories from time to time, until the supply of witnesses is exhausted, *Quere.* *Ibid.* 554.

11. Practice formerly to prepare all the interrogatories both for cross-examination and on general examination of defendant's witnesses before commission opened. *Ibid.* 555.

12. Instances after commission executed of a new commission granted or refused to a defendant, not having interrogatories prepared, at discretion: to be granted with very deliberate attention to the circumstances, not suppressing the depositions taken; but, if necessary, and a reasonable account given, why the defendant's case was not brought forward under the first commission, allowing him a new one for cross-examination, and the direct examination of his witnesses. *Ibid.* 556.

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13. Liberty given to Master to examine upon interrogatories upon motion, without varying the decree. *Wallis v. Thomas*, Vol. VII. 292.

EXCEPTION.

An exception of the thing that is subject of the gift is void. *Bradley v. Peirto*, Vol. III. 325.

EXCEPTIONS.

See PRACTICE, [E.]

EXCOMMUNICATION.

See ABSOLUTION.

EXECUTION.

1. Equity of redemption of a term cannot be taken in execution. *Lyster v. Dolland*, Vol. I. 431.

2. Separate execution under joint judgment. *Ex parte Hamper*, Vol. XVII. 413.

3. Execution against joint property; though the foundation of the action had no relation to the joint concern. *Ibid.*

4. Separate execution under joint judgment. *Wilson, ex parte*, Vol. XVIII. 441.

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[A.] DUTY AND PRIVILEGES.—LIABILITY.—INTEREST.—COSTS.

[B.] WHEN A TRUSTEE OF THE RESIDUE.

And see BARON AND FEME, [D.] 4.
—INFANT, 6.—RETAINER.

1. Executors ought not without great reason to permit money to remain upon personal security longer than is absolutely necessary. *Powell v. Evans*, Vol. V. 344.

2. Cannot buy the debts for his

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own benefit. *Ex parte Lacey*, Vol. VI. 628.

3. Cannot buy for his own benefit debts due from the testator's estate. *Ex parte James*, Vol. VIII. 346. 350.

4. Bound to call in money out upon personal security; and therefore to pay into Court money due from himself. *Eagleton v. Coventry*, Vol. VIII. 466.

5. An executor dying before probate, was held entitled to a legacy given for his care and loss of time, by having concurred with the others in directions for the funeral, and paying small sums on that occasion. *Harrison v. Rowley*, Vol. IV. 212.

6. *Quære*, Whether an executor was entitled to a legacy in that character, who died at a distance, without manifesting any intention to accept the trust, or without knowing it. *Ibid.* 215.

Giving directions for funeral will not make a man executor. *Ibid.* 216.

7. Executor refusing to execute the trust, shall not have the legacy. *Andrews v. Trinity Hall, Cambridge*, Vol. IX. 534.

8. An executor in India, passing his accounts in this Court, is entitled to commission upon receipts, &c. according to the practice in India. *Chetham v. Lord Audley*, Vol. IV. 72.

9. When an executor, under a fair misapprehension, claimed to retain a charge for commission, but which was disallowed by the Master, as not having been charged in his accounts from time to time; the petition to charge him with interest on the sum retained was dismissed. The decree contained no direction as to interest. *Quære*, If it could be brought before the Court by petition? *Bruere v. Pemberton*, Vol. XII. 386.

10. Right to retain his own debt. *Georges v. Georges*, Vol. XVIII. 296.

11. Retainer allowed to one executor out of a legacy to his co-executor in respect of a *devastavit*. *Sims v. Doughty*, Vol. v. 243.

12. Administration not brought before the Master, after a decree passed and entered, if any thing in the decree affecting him by way of order to pay; otherwise if merely to witness what is done. *Haberg-ham v. Vincent*, Vol. i. 68.

13. Not allowed payments made, after decree to account; but to stand in the place of such creditors. *Jones v. Jukes*, Vol. ii. 518.

14. A co-executor, who proved, but never acted, cannot be charged by receiving a bill by the post on account of the estate and sending it immediately to the acting executor. *Balchen v. Scott*, Vol. ii. 678.

15. If an executor without application to the Court does what the Court would have approved, it shall stand. *Lee v. Brown*, Vol. iv. 369.

16. Dividend received by an executor on account of a bond specifically bequeathed, but retained by him, and another, to which he was beneficially entitled under the will, apportioned. *Innes v. Johnson*, Vol. iv. 568.

17. Discharged from a loss under favourable circumstances. *Bacon v. Bacon*, Vol. v. 331. But two executors under the circumstances charged with a loss by neglecting to call in money lent by the testator upon bond. *Powell v. Evans*, Vol. v. 839.

18. Pledge by executors of bonds to the testator, upon advances from time to time for several years: decree at the Rolls, dismissing a bill not by the creditors or legatees, but by co-executors, who had not previously acted, affirmed by the Lord Chancellor on appeal. *M'Leod v. Drummond*, Vol. xvii. 152.

19. Generally a purchaser from an executor not bound by his mis-

application of the money; nor in many cases, even of pledge, if free from fraud, or direct evidence on the face of the transaction of an intended misapplication. *Ibid.* 154.

20. Under a deposit by executors of the testator's property with their own for their own debt, the latter to be first applied. *Ibid.* 158.

21. No action of trespass for mesne profits against the executor. *Pulteney v. Warren*, Vol. vi. 86.

But see ACCOUNT, 12.

22. Devise of annuity of 50*l.*, to be purchased by executor, who till the purchase was to pay annuitant 40*l.* a year; executor instead of purchasing, paid 50*l.* a year from testator's rents, annuitant entitled to 40*l.* the first year, and 50*l.* a year afterwards: though the Court might have charged the executor with the overpayment from the estate, the Master on a general account with just allowances cannot. *Browne v. Spooner*, Vol. i. 291.

Testator may provide that in case of a devolution to executors, they shall not alien, but it must be very special. *Ibid.* 295.

23. Executor pays debts with money received under a decree, which is reversed: he must refund, otherwise, if the appeal is delayed. *Pickering v. Lord Stamford*, Vol. ii. 583.

Every presumption is to be made against a stale demand. *Ibid.*

24. Bill by a legatee very nearly of age to secure the legacy: the costs were given out of the estate: but that will not be done in future upon a bill to secure the legacy of an infant: as under the Legacy Act 36 Geo. 3. c. 51. s. 32. the executor may pay the legacy into Court, and the legatee, when of age, may petition for it. *Whopham v. Wingfield*, Vol. iv. 360.

25. This Court will not before a decree, interpose in favour of an executor against a creditor proceeding at law. *Rush v. Higgs*, Vol. iv. 638.

26. The Court will protect an executor in doing what it would order. *Howe v. Earl of Dartmouth*, Vol. vii. 150.

27. Transfer by an executor, a clear misapplication of assets, immediately after the death, to secure a debt of the executor and future advances, under circumstances of gross negligence, though not direct fraud, set aside by general legatees. *Hill v. Simpson*, Vol. vii. 152.

28. In many respects and for many purposes third persons may consider executors absolute owners. *Ibid.* Vol. vii. 166.

29. Power of disposition generally incident to an executor. *Ibid.*

30. Admission of the receipt of sums, which sums he had paid, &c. a good discharge. *Ridgway v. Darwin*, Vol. vii. 405.

And see ACCOUNT, 9.

31. Executors not charged for a transfer by them to their co-executor of a sum which he actually applied to the payment of debts, merely on the ground that he had himself received other money which he had not applied, but for which he remained answerable. Court directed it to be ascertained whether the specific money was applied in discharge of any, and of what debts. *Lord Shipbrook v. Lord Hinchinbrook*, Vol. ii. 252.

32. To justify an executor in disposing of a fund, upon the representation of his co-executor, the act must be necessary for the purposes of the will, and he must use reasonable diligence to inquire whether the representation be true. *Ibid.*

33. Legacy payable at 21 with 5 per cent. till payable; executrix advanced a sum larger than the legacy by discharging disbursements, all paid *bonâ fide* for the infant, though some were improper. Legatee when of age assigned the legacy. Assignee entitled against executrix to the legacy with 4 per cent. from the time it was payable. *Davis v. Austen*, Vol. i. 247.

34. An executor keeping the fund, and using it for his own benefit, contrary to his trust, decreed to account for interest at 5 per cent. and costs. *Piety v. Stace*, Vol. iv. 620.

35. Charged with interest upon balances in their hands. *Longmore v. Broome*, Vol. vii. 124.

Executor charged with interest on assets in his hands; he having withheld it and gone abroad without putting in his examination being then in contempt; but only 4 per cent. there being nothing but mere negligence. *Rocke v. Hart*, Vol. ii. 58.

To make him chargeable with more, it must be shewn either that he employed it, or derived advantage from it. *Ibid.*

Keeping it at his bankers is an employing it. *Ibid.*

36. Executor calling in the property out upon good securities and using it as his own, without any purpose on the trust, charged with interest at 5 per cent. and costs. *Mosley v. Ward*, Vol. xi. 581.

37. Interest upon balances and costs directed against an administratrix, upon affidavits of her having attempted to support a discharge before the Master by forgeries, &c. *Parnell v. Price*, Vol. xiv. 502.

38. Upon a decree against an executor to account, and a direction to the Master to make half-yearly rests in the computation; held, to

warrant the Master in charging interest upon interest, and the direction to be well executed by a calculation of interest upon each receipt or payment from the day of its being received or paid, a balance struck at the end of the half-year, and carried forward as an item in the succeeding account, carrying interest. *Raphael v. Boehm*, Vol. XI. 92. And affirmed on rehearing. Vol. XIII. 407.

39. When the will expressly directs the executor to accumulate, the Court will not permit him to account, as if the money had been laid out in the funds, if it were not actually so. *Ibid.* 108.

40. Under an imperative direction to an executor to accumulate, held, that his having become bankrupt did not alter the rule, that he should be charged with interest at 5 per cent. with rests. *Dornford v. Dornford*, Vol. XII. 127.

41. Costs of course against executors, who are decreed to pay interest on account of a breach of trust. *Seers v. Hind*, Vol. I. 294.

42. A decree against an executor is in nature of a judgment at law. After that he may on motion, without filing a bill for an injunction, restrain a creditor suing at law. The executor must pay the costs till notice of the decree, but not after notice; and he must make an affidavit as to the funds in his hands. *Paxton v. Douglas*, Vol. VIII. 520.

43. Executors being charged with interest, *semble* costs do not follow as of course, but decreed under circumstances. *Ashburnham v. Thompson*, Vol. XIII. 402.

44. Court allowed the executor costs of the subsequent proceedings, merely following up the account directed by the decree against him: so those occasioned by the neces-

sary investigation of that subject. *Raphael v. Boehm*, Vol. XIII. 591.

45. Creditor filing a bill against an executor, cannot make a debtor of his debtor party: in case of insolvency in the executor the Court will, on petition, appoint a receiver, and compel the executor to allow his name to be used in bringing actions. *Utterson v. Mair*, Vol. II. 95.

46. One executor in trust is not answerable for the receipts of the other merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer: otherwise if he goes farther and concurs in the application. *Hovey v. Blake-man*, Vol. IV. 596.

47. Agents being also appointed executors of the principal, are not entitled to commission upon remittances from India by the testator not received until after his death. *Ibid.*

48. Executors of a receiver admitting assets bound to answer what was upon a subsequent inquiry found due for interest. *Ibid.* 606.

49. Joining in a receipt, though perhaps not exactly necessary, not conclusive against an executor, any more than against a trustee, to charge him with the receipts of his co-executor. *Ibid.* 608.

50. Bill of exchange remitted to two agents, payable to them personally, who on the death of the principal become his executors: the mere indorsement of one, after they are executors, in order to enable the other to receive the money, is not sufficient to charge him who does receive it. *Ibid.* 608.

51. One executor and trustee charged under the circumstances with a loss occasioned by joining in the sale of stock; the other having received all the money and ab-

sconded. *Chambers v. Minchin*, Vol. VII. 186.

52. General rule, that executors joining in a receipt are all chargeable: in the case of trustees, only the person receiving the money. The reason of the distinction. The Lord Chancellor disapproved the relaxation in favour of executors of that rule. *Ibid.* Vol. VII. 198.

53. Executor acting with regard to the testator's property in any other manner than the trust requires is answerable to the *cestui que trust* for any gain, and is liable to any loss. *Piety v. Stace*, Vol. IV. 622.

54. Executor, charged by his answer, not permitted to discharge himself by his affidavit of payments to the testator in his life. *Ridgway v. Darwin*, Vol. VII. 404.

55. A debt due from an executor is assets: the Court, upon suggestion of a legatee, without affidavit, permitted an interrogatory to that effect to be exhibited, upon a bill by legatees and decree for an account. Such an interrogatory ought to be contained in every decree. *Simmons v. Gutteridge*, Vol. X III. 262.

56. Legatee can only obtain an account by bill. *Ibid.*

[B.] WHEN TRUSTEE OF RESIDUE.

And see LEGACY, [L.]—RESIDUE.—TRUSTEE, [C.]

1. At law, executors take absolutely any beneficial as well as nominal interest, when nothing serving to intimate merely a trust. *Bennet v. Batchelor*, Vol. I. 67.

2. Residue unbequeathed; codicil disposing of it, but with blanks for names, &c. not filled up, and unexecuted, found with the will; and contradictory evidence of intent: executor having a specific legacy trustee for the next of kin. *Nourse v. Finch*, Vol. I. 344.

3. Residue unbequeathed; a codicil disposing of it, but with blanks for names, &c. and unexecuted, found with the will, and there being contradictory evidence of intent; the executor, having a specific legacy, held to be a trustee for next of kin. *Hornsby v. Finch*, Vol. II. 78.

A legacy will not take away the executor's right to the residue, unless inconsistent with the supposition that he is to take the whole. *Ib.*

4. Testator gave the residue to his executors for their own use and benefit; afterwards by a codicil he directed them to dispose of it in charities, and part was accordingly applied in founding a school: thirty-five years after the testator's death, all the next of kin and the acting trustee being dead, a bill was filed by the representative of one of the next of kin, on the ground that part of the personal was secured by mortgage; therefore, as to that, the charitable bequest was void, and that the right of the next of kin was but lately discovered; the bill therefore prayed an account of the personal, and that the charitable bequest of what was out on mortgage should be declared void, and that it should result to the next of kin: held that by the codicil the executors were trustees of the whole, and could not claim for themselves; that at all events the next of kin could not recalc what had been laid out; that the length of time alone was not sufficient to raise a presumption, that they knew their right and released it, or acquiesced; therefore an account was decreed, but with special inquiry into all the circumstances, and whether the next of kin released, assigned, or in any manner gave up their right. Upon the report, the special circumstances affording no presumption of a re-

lease, an issue being declined, the accounts being clear, the trustees not being called on to refund what had been applied, and the widow being barred by the will, or her right of election having become impracticable, so much of the personal residue bequeathed to the charity, as was secured on mortgage, was, notwithstanding the length of time, decreed to the next of kin, with interest from the filing of the bill. *Pickering v. Lord Stamford*, Vol. 11. 272. 581.

5. Length of time may bar in equity: 20 years possession bars an equity of redemption: but no time can cover a fraud. *Ibid.* 280.

After 35 years a legacy would be barred on presumption of satisfaction. *Ibid.*

6. Legacy to an executor for his care is equivalent to a declaration of trust, and evidence is therefore inadmissible. *Clennell v. Lewthwaite*, Vol. 11. 472.

7. Executor is entitled to an unbequeathed residue, unless there is a strong and violent presumption against him: a legacy to him affords such presumption; but parol evidence of the intention is admissible to rebut that, and is not to be confined to the time of making the will: but it must be to show the intention at that time only. *Ibid.* 465. 644.

8. Residue unbequeathed decreed to the executor, who was a legatee, upon the intention appearing in the will and by parol evidence. *Ibid.*

9. Testator in India gives all his estate and effects to A. in England in trust, and directs his property to be remitted to him: and after several legacies, he gives A. 800*l.* and requests him, as soon as the property is remitted, to lay out the same in the funds, or other securities, which shall appear most advantageous for those which shall be benefitted by

it hereafter. The 800*l.* is a beneficial legacy, not in trust. *Wadley v. North*, Vol. 111. 364.

10. So, executor having specific bequests by will and codicil, held a trustee for next of kin, as to the residue. *Holford v. Wood*, Vol. 1v. 76.

11. Testatrix by will appointed an executor, and gave him a legacy: afterwards by a testamentary paper she directed the residue to be disposed of according to private instructions to him; and having by a subsequent codicil added another executor, died without giving any instructions: the executors are trustees of the residue for the next of kin. *Mordaunt v. Hussey*, Vol. 1v. 117.

12. A partnership in London being appointed, not individually, but as a firm, executors and guardians claimed the residue undisposed of, in exclusion of persons appointed attorneys, executors, and guardians, in Denmark, and others appointed attorneys and executors in India: decreed a trust for the next of kin; and it was referred to the Master to appoint a guardian. *De Mazar v. Pybus*, Vol. 1v. 644.

13. Bequest of various particulars, comprising all the testator's personal estate to his wife for life: then, after specifically disposing of and charging with legacies certain parts after the death of his wife, he appointed her executrix, she paying his debts and funeral expenses: held a resulting trust as to the residue; there being no farther disposition and no evidence. *Dicks v. Lambert*, Vol. 1v. 725.

14. Executor takes the residue undisposed of, unless there is a strong and violent presumption against him. A legacy does afford that presumption, unless there are special circumstances. *Ibid.* 729.

15. Ground of admitting parol evidence between the executor and next of kin as to the residue undisposed of. *Ibid.* 730.

16. Bequest to executor by way of exception is not sufficient to bar him from the residue undisposed of. *Ibid.* 731.

17. One executor being, by a legacy for his care, clearly a trustee of the residue for the next of kin, the other is also. *White v. Evans*, Vol. IV. 21.

When it appears, by express declaration or inference, that executors are not to take the residue beneficially, they are trustees. A legacy is only one mode of shewing it; and if expressed to be for care and trouble, parol evidence cannot be received. *Ibid.* 22.

18. Executors having legacies of 20*l.* a-piece to buy mourning rings and equal specific legacies, were upon the former held trustees of the undisposed of residue for the next of kin. *Nisbett v. Murray*, Vol. V. 149.

19. Equal legacies to two executors make them trustees of the residue undisposed of; notwithstanding inequality as to the real estate. So, though the legacies are given by a subsequent instrument. *Muckleston v. Brown*, Vol. VI. 64.

20. Executor held a trustee for the next of kin of the residue undisposed of upon a legacy, against an argument upon the will opposing the presumption. *Abbot v. Abbot*, Vol. VI. 343.

See CHARITY, 30.—EVIDENCE, 23.—EXECUTOR, 22.

21. At law the appointment of an executor is a gift of every thing not disposed of. Vol. VII. 228.

22. Executors, though not having legacies, held trustees of the residue for the next of kin. *Urquhart v. King*, Vol. VII. 225.

23. A legacy to an executor raises a presumption against his legal title to the residue; which he may rebut by evidence. Vol. VII. 229.

24. Where the executor is trustee of the residue for the next of kin, parol declarations previous and subsequent to the will, as well as at the time, are admissible; but their weight and efficacy very different. Vol. VII. 518.

See AGREEMENT, 48. 50, 51.—TRUST (resulting), 85.—SATISFACTION, 26.

25. Personal estate bequeathed to trustees upon trust. The executors, one of whom was also one of the trustees, not entitled beneficially, in default of the declaration of trust. *Milnes v. Slater*, Vol. VIII. 295.

26. Legacy to a man described as executor: if the office does not continue, he shall not have the legacy. Vol. VIII. 593.

27. Two of the executors being clearly trustees by the effect of directions annexed to their appointment, all the executors are trustees for the next of kin of the residue undisposed of. *Sadler v. Turner*, Vol. VIII. 617.

28. Legacies of a diamond ring to one, and of 200*l.* each to some of the others for mourning rings, as a token of affection, &c. would not make the executors trustees. *Ibid.*

See ASSETS, ADMINISTRATION OF, 6.—TRUST, 92.

29. When executors and trustees joined in the transfer of all the stock into their own names, and lent produce of part to a partnership in which one of them was engaged, held liable for loss occasioned by such loan, although the others received no benefit. *French v. Hobson*, Vol. IX. 103.

30. When the appointment of executors, "if they will be so good

as to do it," implied a burthen, and not a beneficial interest, held that a gift to them of the reversionary interest after a life interest, in annuities, made them trustees of the residue for the next of kin. *Seley v. Wood*, Vol. x. 71.

31. A legacy being given to one executor for his trouble, the Court admitted parol evidence on behalf of the co-executrix, to rebut the presumption for the next of kin, and afterwards decreed her to be entitled to the residue. *Williams v. Jones*, Vol. x. 83.

32. A plaintiff having taken probate, must be taken to be executor, where testator appointed four executors, and gave legacies only to two, following the appointment of a specific trust to them; and legacies were also given to the only next of kin: held that they were not trustees of the residue. *Griffiths v. Hamilton*, Vol. xii. 298.

33. Executors have a joint interest in such residue which survives. *Ibid.*

34. A specific legacy to an executor, expressly for his care and trouble, amounts to a declaration that he is not to take the residue beneficially. But unequal legacies given to them do not make them trustees; the effect is only a preference *pro tanto*. When, however, one be clearly a trustee, all his co-executors also are trustees. *Ibid.*

35. A legacy to the next of kin affords no inference against his title to the residue undisposed of. *Ibid.* 309.

36. Executors, two having unequal legacies, and the other none; held not to take the residue as trustees. *Rawlings v. Jennings*, Vol. xiii. 46.

37. Appointment of executor, though an extinguishment at law of a debt due from the executor to

the testator, yet a trust is raised in equity for the next of kin. *Berry v. Usher*, Vol. xi. 90.

38. Where, from the circumstances, it appeared that the testator, in the amount and equality, considered them in the character of executors, held that an executor having renounced, was not entitled to the legacy. *Stackpoole v. Howell*, Vol. xiii. 417.

39. *Primâ facie*, the presumption is, that a legacy is given to an executor in that character. *Ibid.*

40. When only one executor had a legacy, and no inference from the will that they were to take as trustees, held that they were entitled to the residue, though they were called trustees to the will, and were clearly such as to part of the property. *Semble*, They will, in general, take beneficially, unless there is a strong and violent presumption that they shall not so take. *Pratt v. Sladden*, Vol. xiv. 193.

41. If executors are appointed expressly in trust, and the trust is co-extensive with the office of executor, they cannot take beneficially. *Ibid.* 198.

42. A direction that "all my property shall pass by this my codicil, according to law, save and except," &c., two or three small legacies, and appointing an executor therein, requesting him "to make such little arrangements as he has reason to think I should wish," held that such request did not determine the question as to his beneficial interest in the residue. Decreed that the testator was trustee for the widow and next of kin, according to the statute. *Lord Cranley v. Hall*, Vol. xiv. 307.

43. A bequest to executors upon a trust not declared, or one which fails, the executors being clearly intended not to have the benefit,

must be trustees for the next of kin : but a bequest to them for such purposes as they shall think fit, is a gift to them. *Paice v. Archbishop of Canterbury*, Vol. xiv. 370.

42. Upon marriage articles in favour of a daughter, subsequently confirmed by a paper reciting them, with a direction, that all his property should be vested in the husband, "preferable to any executor," for the purposes of such articles. Probate of such paper having been granted to the husband as executor, held to be conclusive, and that he took beneficially, and not as trustee. *Walton v. Walton*, Vol. xiv. 318.

43. It is not universally true, that the expression of a purpose for which even a devise is made, confines the devise to that purpose alone, with a resulting trust for the heir: there is no general rule, each case depending upon its own particular circumstances. *Ibid.* 322.

44. An executor is always permitted to give parol evidence in favour of his legal title, except where he is unequivocally declared a trustee. *Ibid.*

45. The Court will not grant an issue to determine that question between the executor and the next of kin. *Ibid.* 323.

46. Testator gave all his estate and effects to two persons, their heirs, executors, &c.; upon trust in the first place to pay, and charged and chargeable with, all his debts and funeral expenses, and the legacies after given. *Ibid.*

47. Those persons, whether they could claim in their individual characters, or not, being afterwards appointed executors, held entitled to the residue undisposed of (including a legacy to a charity, void by the stat. 9 Geo. 2. c. 36.) for their own benefit, against the claim of the next

of kin; the whole property being personal. *Dawson v. Clark*, Vol. xv. 409.

48. Instances where the residue being intended to be given from the executors, they cannot take it, though the bequest does not take effect. *Ibid.* 414.

Executors take the residue precisely in the same plight as residuary legatees would take it. *Ibid.* 417.

49. Executor having general and specific legacies not expressly for his care, &c., was not precluded from giving evidence of the intention, that he should have the residue beneficially, by an exception of plate out of furniture bequeathed to him, and by a bequest to him of a contract for a leasehold house, subsequent to the appointment of executor: the effect being only that he should not take the plate under that bequest of furniture; and a future disposition of the residue might have been contemplated. Upon the evidence raising no direct intention in his favour, but mere inference from equivocal declaration, with an intention to make an express residuary disposition, the executor declared a trustee of the residue for the next of kin. *Langham v. Sanford*, Vol. xvii. 435.

50. Executor having a legacy expressly for his care, &c. cannot produce evidence of intention that he should take the residue beneficially. *Ibid.* 443.

51. Against the claim of an executor to the residue, no stress laid on a direction for payment of his legacy out of the personal estate. *Ibid.* 642.

52. Legacy to an executor, pecuniary or specific, raises a strong and violent presumption, that he was not, when the will was made, intended to take the residue beneficially; to be rebutted in equity

by parol evidence, clear and strong, of intention, that he shall take it. *Ibid.* 643.

53. Parol evidence not admissible, where it appears clearly and conclusively on the face of the will, that the executor was meant to be a trustee of the residue: nor, if the legacy appears clearly not inconsistent with his taking the residue. *Ibid.*

54. Legal right of executor to the residue, unless a strong and violent presumption to the contrary; which a legacy to him affords; liable to be rebutted by parol evidence of intention, that he shall have it. *Ibid.* 646.

55. Question, whether executor, when appointed, was intended to have the residue, always determined by the Court. *Ibid.*

56. Executors not excluded from the residue by a legacy to one, or unequal legacies to all. *Ibid.* 648.

57. Testator presumed to know the law, viz. that a legacy to his executor excludes him from the surplus. *Ibid.*

58. Distinction between the effect of an incomplete residuary disposition, and disposition by the will, or by a codicil, upon the executor's legal right to the residue. *Ibid.* 651.

59. Effect of the distinction upon a legacy to a person by name, or by the description of executor; in the latter case, he takes in that character, with all the consequences. *Currie v. Pye*, Vol. xvii. 466.

The decree affirmed on appeal. *Langham v. Sanford*, Vol. xix. 641.

EXECUTORY DEVISE.

And see ACCUMULATION, 2. 4.

1. Executory devise is, in its na-

ture, equitable; and becomes legal estate only by application of the statute of uses, which executes every species of interest that a court of equity would before; and that has been extended to cases not in contemplation of the statute. *Perry v. Phillips*, Vol. i. 255.

2. Devise of real estates and land to be purchased with the residue, to trustees and their heirs, &c. upon trust to accumulate rents and profits during the lives of testator's three sons, A., B., and C., and such of their sons (his grandchildren) as should be living at the time of his decease, or born in due time after; and after the death of the survivor to be divided into three lots: one of which he settled on the then eldest male lineal descendant of A. in strict tail male, with divers remainders over; and the two other lots to the then eldest male lineal descendant of B. and C. respectively, with similar limitations; and upon failure of such male lineal descendants, upon trust, to sell and pay the produce to his Majesty, his heirs and successors, to the use of the sinking fund. Decree establishing the trusts of the will affirmed by the House of Lords upon appeal. *Thellusson v. Woodford*, Vol. xi. 112.

3. A testator may give a life estate to be appointed by the survivor of one thousand persons. *Ibid.* 145.

4. Property may be so limited as to make it unalienable during any number of lives, not exceeding that to which testimony can be applied to determine when the survivor drops. *Ibid.*

5. In executory devises, the time of gestation may be taken both at the beginning and the end. *Ibid.* 149.

6. The number of contingencies for an executory devise not material,

if to happen within the limits allowed by law.. *Ibid.* 327.

7. They cannot be governed by the rules of law, as to common law conveyances; but whether they are to happen within a reasonable time or not. *Ibid.* 328.

8. Every executory devise is good that does not tend to a perpetuity, i. e. that does not tend to make an estate unalienable beyond the period allowed by law, as to legal estates. Judges have, since the revolution, approved of extending such devises; but there is no instance of a limitation of the number of lives. *Ibid.* 332.

9. Limitation to executory devises twenty-one years after a life in being, allowing the period of gestation. *Countess of Lincoln v. Duke of Newcastle*, Vol. XII. 232.

EXEMPTION.

And see DEBTS, *passim*.—ASSETS, *passim*.—ELECTION, 20.

EXONERATION.

And see ESTATES FOR LIFE, 2.—DEVISE, 54. 81.

1. Tenant in tail restrained as to alienation, but with powers of leasing and jointuring as tenant for life, considered as such: and therefore his personal representative a creditor for a charge on the estate paid by him (contrary intent not appearing), though the subsequent remainders were of the same nature, and the term having been very short, little more than forty years remaining. *Countess of Shrewsbury v. Earl of Shrewsbury*, Vol. I. 227.

2. Upon the purchase of an equity of redemption, the agreement of the purchaser with the vendor to pay

the mortgage, without any communication with the mortgagee, is not sufficient to make it the personal debt of the purchaser. *Butler v. Butler*, Vol. v. 534.

3. To exempt the personal estate from payment of the debts, the will must afford a necessary implication; viz. that inference, that leaves no doubt upon the mind of the judge. *Hartley v. Hurle*, Vol. v. 540.

4. Bequest of personal estate exempt from debts by mortgage; the benefit of the exemption was confined to that legatee; and failed, the bequest having lapsed by the death of the legatee in the life of the testator. *Waring v. Ward*, Vol. v. 670.

5. Devise of all his real estates (except a moiety of *P.* to be thereafter disposed of) to trustees, subject to the payment of debts, legacies, &c.; and further devise of the moiety of *P.* to trustees, to buy, demise, sell, or mortgage, to raise and pay 400*l.* to plaintiff, with remainders over; but no direct bequest to the plaintiff of 400*l.*: testator then gave certain legacies, and charged the residue of his personal estate with payment of debts, &c., in exoneration of the real estates before charged: held that the 400*l.* was an exclusive charge upon the moiety of *P.*, which was not exonerated by the subsequent direction, which was referred to the prior charge, expressly excepting the estate afterwards charged with that sum. *Spurway v. Glynn*, Vol. II. 483.

6. And interest was decreed upon such charge at four per cent.

7. To exempt the personal estate from the debts, the will must shew that intention by indication plain: a provision for the debts out of the real estate is not sufficient. *Brydges v. Phillips*, Vol. VI. 567.

8. To exempt the personal estate

from the debts, there must be declaration plain, or manifest intention. *Howe v. Earl of Dartmouth*, Vol. VII. 149.

9. The heir of a purchaser exonerated by his personal assets from a mortgage, the result of the transaction being a personal contract; and the personal assets, therefore, the primary fund. *Waring v. Ward*, Vol. VII. 332.

10. No exoneration of the heir by the personal assets of a party, who never personally contracted; or not originally, but only as a farther security in a subsequent transaction, not intended to disturb the order of charge: as the transfer of a mortgage, or the purchase of an equity of redemption: even though the interest is raised, the excess follows the subject of the original contract. *Ibid.*

11. Exoneration of the heir from a mortgage, the personal debt of the ancestor. *Ripley v. Waterworth*, Vol. VII. 453.

12. In order to exonerate the personal estate, there must be either express words or a plain indication of intention, and not by a mere charge. *Watson v. Brickwood*, Vol. IX. 447.

13. Portions to be raised by a trust term in a settlement, the real estate held the primary fund; and a covenant by the settler to pay them auxiliary only. *Lechmere v. Carleton*, Vol. xv. 193.

14. The personal estate being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration, or plain and unequivocal manifestation of intention: and neither a charge, nor a direction to sell, nor the creation of a term for payment, will exempt the personal testator. *Tower v. Lord Rous*, Vol. xviii. 132.

15. The circumstance, that the residuary legatee is the first taker of the real estate, sometimes held a ground for exempting the personal. *Ibid.* 140.

16. Exoneration of the personal estate from the payment of debts upon the plain intention, collected from the whole will. *Bootle v. Blundell*, Vol. xix. 494.

17. To exempt the personal estate from the debts, express words are not necessary: there must be plain intention and necessary implication, *i. e.* not resting on conjecture, but sufficient to convince the judge. *Ibid.* 517.

18. The personal estate first liable, in equity at least, to the debts. Its amount, unless apparent on the face of the will, makes no difference. Not sufficient that the real estate is charged, unless the personal estate is discharged. *Ibid.* 518.

19. Upon the question of exoneration of the personal estate, stress laid on the circumstance, that the same persons are to deal with the real and personal estates. *Ibid.* 528.

20. The personal estate first liable to the debts; unless the intention is clearly to exempt it, and throw them wholly on the real; for which express words are not necessary. *Ibid.* 521.

21. Lord Thurlow's and Lord Northington's opinions, that there is no difference upon the question of exonerating the personal estate from giving it to the person appointed executor. *Ibid.* 522.

22. Weight of the clause appointing the trustees of the real estate, charged with the debts, executors depending upon the whole will. *Ibid.* 522.

23. Upon the question, whether the real estate is exonerated, the Court is neither to go by conjecture, nor to require an intention so clear

that no one can say it is otherwise. If the mind of the judge is convinced of the intention, he is bound to declare it. *Bootle v. Blundell*, Vol. XIX. 526.

24. To exempt the personal estate from payment of the debts, the intention, not merely to charge the real estate, but so as to discharge the personal, must be collected from the whole will so clear as to convince the judicial mind, which is to determine. *Ibid.* 526.

25. Generally the personal estate is the primary fund for debts, funeral expenses, and legacies not given out of a particular fund. *Ibid.* 527.

26. Generally the trustees of the real estate being the executors is against the intention to exempt the personal estate from the debts; but may, under circumstances, turn the other way; as if they have legacies payable only out of the real estate. *Ibid.* 527.

27. As to the effect, upon the question, whether the personal estate is exonerated from the debts, of the distinction, whether it is given as residue, or as the personal estate simply, or after enumerated articles of a nature not applicable to the payment of debts, *Quere.*

The weight of such circumstances and of the inference from a strict settlement of an intention to preserve the real estate, depends on the whole of the will. *Ibid.* 531.

28. On the question of exonerating the personal estate from the debts, great stress has been laid on the real estate being made liable to the funeral expenses, &c. *Ibid.* 533.

EXTENT.

There is no equity for a person, against whom an extent in aid has issued, to be reimbursed by his cre-

ditor, on the ground, that he has property sufficient to satisfy his debt to the crown without having recourse to the extent in aid. *Phillips v. Shaw*, Vol. VIII. 241.

And see PRACTICE.

EVIDENCE.

[A.] PAROL, TO EXPLAIN.

[B.] PRESUMPTIVE.

[C.] HEARSAY.

[D.] PUBLIC DOCUMENTS, LEGAL PROCEEDINGS.

[E.] HANDWRITING.

[F.] EXAMINATIONS, ANSWERS, WITNESSES.

[G.] PRIVATE WRITINGS.

[A.] PAROL, TO EXPLAIN.

And see AGENT AND PRINCIPAL,

[A.] 12.—AGREEMENT, [B.] 4,

5, 6.—BARON AND FEME, [E.] 2.

—DEEDS.

1. Parol evidence not admitted to prove an agreement made upon the purchase of an annuity, that it should be redeemable. *Hare v. Sherwood*, Vol. I. 241.

2. On a written agreement parol evidence admissible in equity in cases of fraud, and where party will admit there was some agreement. *Ibid.* 243.

3. Agreement for a lease of a farm referring to a paper containing the terms, parol evidence to prove, which of the clauses in that paper had been read at a meeting between the parties, refused. *Brodie v. St. Paul*, Vol. I. 326.

4. Parol evidence admissible to rebut a presumption; without regard to the nature of it; as, whether a mere casual conversation with a stranger, or between the parties and upon the subject; or whether at the time of the transaction, previous or subsequent. But those circum-

stances are very material with reference to the weight and efficacy of it. *Trimmer v. Bayne*, Vol. vii. 508.

5. Declarations of a party to a deed previous to the execution admitted in support of the deed against imputations of fraud; declarations subsequent, impeaching the deed, were rejected. *Conolly v. Lord Howe*, Vol. v. 700.

6. Evidence to prove the intention of the parties to a settlement refused. *Brydges v. The Duchess of Chandos*, Vol. ii. 417.

7. An agreement accompanying the deposit of title deeds, though inadmissible as evidence for want of stamp, does not exclude parol evidence, if otherwise admissible, the agreement itself would only be received as an acknowledgment of the fact and purport of the delivery. *Hiern v. Mill*, Vol. xiii. 119.

8. Though a paper, as the particular upon a sale by auction, may by reference be engrafted into a contract within the statute of frauds, that will not authorise the introduction of parol evidence to show what part was read. *Higginson v. Clowes*, Vol. xv. 522.

9. Circumstances not sufficient evidence of a release of a bond debt. *Reeves v. Brymer*, Vol. vi. 516.

10. Upon a legacy to wife of the testator by the description of his chaste wife, evidence of her incontinence is not admissible. *Kennell v. Abbott*, Vol. iv. 809.

11. A legatee, son-in-law to the testator was held entitled to his legacy discharged from debts due by him to the testator, and a debt, for which the testator was his surety, upon evidence from the testator's accounts, letters, and memorandums in his hand-writing. Parol evidence of declarations in conversation was produced for the same purpose: but

the Court appeared to rely on the evidence in writing. *Eden v. Smyth*, Vol. v. 341.

12. Evidence that an appointment was improperly obtained, being executed by a will regularly proved, was rejected. *Kemp v. Kemp*, Vol. v. 849.

13. Upon a presumption of satisfaction by will, evidence admissible: first, to constitute the fact, that the testator was debtor; secondly, to meet or fortify the presumption. *Pole v. Lord Somers*, Vol. vi. 321.

14. Admitted upon equities arising out of presumptions; and in the case of the next of kin and executor evidence between the will and the death of the testator, but as to his intention at the date of the will. *Ibid.* 324.

15. A statement of property written by the testator, and his books of accounts, admitted as evidence, that he considered as his property, and meant to dispose of, property, not strictly, though in some sense, his: mortgages and leases, the property of his wife under a will, by which he was executor with her before marriage. *Druce v. Denison*, Vol. vi. 385.

16. Parol evidence admissible upon a latent, not upon a patent, ambiguity, to rebut equities, grounded upon presumption, and perhaps to support the presumption, to oust an implication, and to explain, what is parcel of the premises granted or conveyed. *Ibid.* 397.

17. Extrinsic evidence admitted, not to construe a will, but to show with reference to what it was made. *Bengough v. Walker*, Vol. xv. 514.

18. Legacy to A. if in the testator's service at the time of his decease.

Parol evidence admitted to show, that, though she had quitted his house, she continued, and was considered by him as in his service;

and upon that evidence the legacy was established. *Herbert v. Reed*, Vol. xvi. 481.

19. Evidence not admissible to alter a will. *Ibid.* 481.

[B.] PRESUMPTIVE.

1. A declaration of uses by the founder of a charity presumed from an entry in an ancient book, purporting to be such declaration, but without signature or date; the book being kept by the trustees for entering their proceedings, and containing an order by the trustees, dated six years after creation of the trust, that the declaration of the founder be then entered as a direction to the trustees. *Att. Gen. v. Boulbee*, Vol. II. 380.

2. The existence and execution of a settlement by indentures of lease and release presumed from circumstances; principally the existence of the drafts; the statement in an abstract of the title, and the existence of the lease for a year of other estates appearing to have been included in the same plan of settlement. *Ward v. Garnons*, Vol. xvii. 134.

3. The production of a paper importing to be an attested copy, may with other evidence have considerable weight. *Ibid.* 140.

[C.] HEARSAY.

1. Upon the trial of an issue of pedigree, held that declarations of a husband that his wife was illegitimate were admissible, with the qualification whether he knew it, not whether he had heard it from her relations. *Vowles v. Young*, Vol. xii. 140.

2. So declarations of heads of families made of record upon inquisitions *post mortem*. So inscriptions, rings, &c. *Ibid.*

3. The rule of evidence that hus-

band and wife cannot give evidence for or against each other does not extend to collateral declarations of this kind, where there is no interest in the husband. *Ibid.*

4. So hearsay of relations, in pedigree cases, without showing how the consanguinity is made out, is evidence from the interest of the person in knowing the connexion of the family. *Ibid.* 167.

5. Therefore the opinion of the neighbourhood and acquaintance will not do. *Ibid.*

6. Tradition in pedigree cases must be from persons having such a connexion with the party to whom it relates, that it is probable, from their domestic habits and connexions, they could not be mistaken. *Whitelocke v. Baker*, Vol. xiii. 514.

7. Declarations of relations evidence of pedigree, but inconclusive without showing on what occasion, what led to them, &c.

Whether a physician or servant who attended the family can be admitted as one of the family, *Quære. Walker v. Wingfield*, Vol. xviii. 443.

8. Object of taking evidence in secret to prevent attempts to support defective evidence already given; but further inquiry when necessary not refused. *Ibid.* 443.

[D.] PUBLIC DOCUMENTS, LEGAL PROCEEDINGS.

1. The Fleet register evidence, not as a register, but a declaration upon the fact. *Lloyd v. Passingham*, Vol. xvi. 59.

2. By the canon law the clergy are required weekly to form and sign the registers, and annually to transmit a duplicate to the ordinary. That duplicate is evidence. *Lloyd v. Passingham*, Vol. xvi. 63.

3. A notary public has credit every where; but the certificate of

a magistrate of a colony abroad requires evidence to his character. *Hutcheon v. Mannington*, Vol. VI. 823.

4. Papers of record in another Court, if they would be evidence, shall be used at the hearing, saving all just exceptions. *Ex parte Bernal*, Vol. XI. 559.

5. Proceedings under a commission of bankruptcy in the secretary's office not permitted to be used as evidence, in actions by strangers unconnected with the commission. *Jervis v. White*, Vol. VIII. 314.

6. Copies of the books of the Bank of England are evidence; but upon a question, whether the signature to a transfer is the genuine handwriting, the book must be produced. *Auriol v. Smith*, Vol. VIII. 198.

7. Copy of the parish register evidence. *Ibid.* 204.

8. As to admitting in evidence a parish register, not kept according to the canon, requiring weekly entries, or a copy without proof that the original is not to be found, *Quære*. *Walker v. Wingfield*, Vol. XVIII. 443.

9. Parish register admissible evidence notwithstanding the loss of a leaf not destroying the series of entries. *Ibid.*

[E.] HANDWRITING.

1. Rule as to proof of handwriting. The witness must have seen the party write; and swear to his belief, that the writing produced is his. *Eagleton and another v. Kingston*, Vol. VIII. 473.

2. Comparison of hands by a person, who never saw the party write, is not evidence. *Ibid.* 474.

3. If the witness will not swear to his belief of the handwriting, but says, that he thinks it like, the Lord Chancellor of opinion that is not evidence. *Ibid.* 476.

[F.] EXAMINATIONS, ANSWERS, WITNESSES.

1. Bill for specific performance of a parol agreement to renew, plaintiff having built a house; the only witness for the plaintiff proved an agreement different from that in the bill; two defendants by answer stated an agreement different from both; in strictness the bill ought to be dismissed: but specific performance was decreed according to the answers, with costs against the plaintiff. *Mortimer v. Orchard*, Vol. II. 243.

2. Plaintiff cannot have a decree on the testimony of one witness contradicted by the answer of one defendant. *Ibid.* 244.

3. A rule of property in equity is not therefore to be adopted at law; the Courts in some respects proceeding upon different principles; Courts of equity for instance not allowing a single witness, unless supported by circumstances, to prevail against a positive denial by the answer. *Evans v. Bicknell*, Vol. VI. 183.

4. The question, whether evidence, viz. a schedule written by the testator subsequent to the will, could be admitted, was not decided. *Pole v. Lord Somers*, Vol. VI. 309.

5. Upon a decree taken by default at the hearing, the evidence cannot be entered as read. *Stubbs v. —*, Vol. X. 30.

6. Answers by one defendant cannot be read as against another. *Quære*, whether a trustee against whom plaintiff does not desire a personal decree may be examined. *Morse v. Royal*, Vol. XII. 362.

7. Answer read as evidence, contrasted with the other evidence, not for the purpose of discrediting it. *Savage v. Brocksopp*, Vol. XVIII. 335.

8. Distinction at law and in equity

as to reading the answer; at law the whole must be read. *Ibid.* 336.

9. A single witness, not corroborated, not sufficient against positive denial by the answer. *Cook v. Claynorth*, Vol. xviii. 12.

10. A single witness cannot prevail against the answer, unless confirmed by circumstances. *Savage v. Brocksopp*, Vol. xviii. 335.

11. Evidence of conversation overheard by a witness placing himself behind the wainscot, &c. received with great caution. *Ibid.* 335.

12. Upon bill for discovery only, and answer read for that purpose, the whole must be read; but when relief is prayed, and plaintiff replies to the answer, putting the whole in issue, he cannot read it in parts, but must proceed to the completion of the immediate subject, which the defendant is answering, as a witness answering at law, may proceed to state any thing with reference to it. But this does not apply to distinct matter. *Lady Ormond v. Hutchinson*, Vol. xiii. 54.

13. Party demurring to the discovery, or witness refusing to answer facts tending to criminate himself; no inference to the truth of the fact. *Lloyd v. Passingham*, Vol. xvi. 59.

14. Witness not compelled to answer interrogatories, having a direct tendency to subject him to penalties, &c. or having such a connexion with them as to form a step towards it.

The question should not be made upon exception to the Master's certificate, that he had allowed the interrogatories; but if the witness takes the objection to the certificate, whether the examination is or is not sufficient. *Paxton v. Douglas*, Vol. xvi. 239.

15. Relaxation of the old practice for the Court to inform a witness,

that he was not bound to answer. *Ibid.* 242.

16. Order, that depositions shall be read at the trial of an issue; if the witness shall be then dead; or proved to be in such a state of health as not to be capable of attending.

Without such order, to make the depositions evidence at law, the whole record must be read. *Palmer v. Lord Aylesbury*, Vol. xv. 176.

17. Witnesses having been examined *de bene esse*, with the view to a trial at law, the examination of another witness is not permitted without strong circumstances; as, upon a second ejectment, brought after verdict for the defendant, the examination of a witness, produced at the trial, who had not been examined under a bill to perpetuate testimony, was permitted; not as to other witnesses. *Ibid.* 299.

18. Distinction as to an answer to a bill of discovery, read as evidence at law: the whole must be before the jury. *Butterworth v. Bailey*, Vol. xv. 362.

19. Depositions before publication suppressed; being taken by the commissioners ready prepared: the witness being agent in the cause; and the mode, in which the Court receives the information, whether from the commissioners, or otherwise, is not material.

The commission directed to proceed for the purpose only of re-examining that witness; substituting another commissioner for one, who, having refused to qualify, was not permitted to be present at the examination. This order not to prevent the Court's opening the depositions, if a case of necessity should arise; as, if the witness could not be again examined. *Shaw v. Lindsey*, Vol. xv. 380.

20. Depositions suppressed: the

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commissioners having employed the clerk of one of the parties as their clerk. *Ibid.* 380.

21. Witness cannot give as his evidence answers in writing prepared before the examination: nor is any suggestion to him by the attorney, counsel, or any other person, during the examination, permitted; and in equity whenever such fact is disclosed, the deposition will be suppressed. *Ibid.* 381.

22. Deposition suppressed, and a re-examination directed; the deposition being taken from the witness, using during the examination full minutes in writing, which she stated to have been originally her own, put into method by the attorney; and so copied with some corrections by herself. *Ibid.* 382.

[G.] PRIVATE WRITINGS.

Entries in banker's books, not proved to have been communicated to the customer, not evidence against, but may be for him. *Ex parte Pease*, Vol. XIX. 25.

FELON.

1. Plea without oath of plaintiff's conviction for felony to a bill by the residuary legatee for an account of the personal estate of a testatrix, who died after the conviction, but before sentence of transportation completed, allowed; the conviction proved by the record alone; and not necessary to state even the identity upon oath. — *v. Davies*, Vol. XIX. 81.

2. Whether a person, returned after sentence of transportation suffered, cannot acquire property, *Quære.* 82.

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See **BARON AND FEME**, *passim*.

FOREIGN STATES, COURTS.

FINE.

1. Fines are levied by all the descriptions of names, in order to take in every thing, and no objection that any thing described was not really included. *Butler v. Every*, Vol. I. 138.

2. Tenant in tail with reversion in fee leyving a fine, lets in the reversion; but suffering a recovery bars it and all incumbrances, and gains a new fee. *Cave v. Holford*, Vol. III. 675.

3. A bill in equity not sufficient to prevent the operation of a fine at law. *Toulmin v. Price*, Vol. V. 238.

4. Remainder under an old settlement barred by a fine and non claim: the fine also working a discontinuance. The defendants producing the lease for a year and a copy of the release, the original not being forthcoming, the bill was retained, with liberty to bring an ejectment; and in default the bill to be dismissed with costs. *Snell v. Silcock*, Vol. V. 469.

5. When a fine is pleaded in bar, there must be a direct and positive averment of seizin. *Dobson v. Leadbeater*, Vol. XIII. 230.

FISHERY.

See **CORPORATION**, 5. 10.

FOREIGN STATES, COURTS.

And *see* **JURISDICTION**, 8, 9.

1. Court cannot take notice of a foreign government, not recognised by the government of the country in which the Court sits: and whether it be so recognised is matter of public notoriety. *Berne City, &c. v. Bank of England*, Vol. IX. 347.

2. Where the former government of Switzerland had vested funds in

the hands of trustees, the Court refused an order upon the trustees to pay dividends into Court, received by them prior to the filing of the bill, on the application of persons constituting the present government, the Attorney-General not being a party. *Dolder v. Bank of England*, Vol. x. 352.

3. Property belonging to a corporation, existing under the king's charter, not transferred to a body created under another power, and therefore not existing under his authority, being found in this country, vests in the Crown as *bonâ vacantia*. *Ibid.* 354.

4. *Quere*, Whether the recent government established in Switzerland, on the revolution there, and not acknowledged here, can maintain a suit in respect of stock purchased in the name of trustees by the former government? *Dolder v. Lord Huntingfield*, Vol. xi. 283.

5. An allegation of a war between foreign states must be proved, but the Courts take notice of that with reference to our own country. *Ibid.* 293.

6. Distinction between a foreign independent state, and the colony of Maryland in a state of rebellion. *Ibid.* 294.

FORFEITURE.

And see KIN, NEXT OF, 4.—LANDLORD AND TENANT, 5.

1. Where a portion was given over upon marriage without consent in writing of testatrix's executors, and the trustees approved of the settlement at first offered; but upon the same settlement, or any other, being afterwards refused to be executed, the trustees refused their consent, the Court refused to relieve against

the forfeiture. *Dashwood v. Lord Bulkeley*, Vol. x. 230.

2. If consent were once given, it shall not be withdrawn by adding terms that do not go to the propriety of giving the consent. *Ibid.*

In many cases, though upon the treaty, the intention seemed to be that the settlement should be before marriage, a settlement after marriage has been held sufficient to satisfy such a conditional offer. *Ibid.* 245.

3. On a covenant to lay out a specific sum within 5 years secured by a clause of re-entry on default; held first, that the Court had jurisdiction to relieve against forfeiture upon the principle of compensation. Injunction against an ejectment brought granted on the terms of complete compensation, including all the costs in law and equity, and the premises put in the same state of repair, as if the money had been applied according to the contract. *Sanders v. Pope*, Vol. xii. 282.

4. Court cannot relieve against forfeiture under the by laws of a corporate company, occasioned by the party's omitting to inform himself of the orders and rules of the company. *Sparks v. Liverpool Waterworks Company*, Vol. xiii. 428.

5. Relief against forfeiture of a lease for breach of covenant, not extended beyond the case of payment of money, as in the instance of rent to the other covenants as to repair. *Hill v. Barclay*, Vol. xviii. 56.

6. Stat. 4 Geo. 2. c. 28. regulating the relief of a tenant against a forfeiture for a breach of covenant by non-payment of rent. *Ibid.* 60.

7. No relief against forfeiture by breach of covenant not to assign, without licence. *Ibid.* Vol. xviii. 63.

FORGERY.

Forgery not conclusive against a fact, proved by other evidence. *Lloyd v. Passingham*, Vol. xvi. 59.

FORMEDON.

See ESTATE TAIL.

FOUNDLING HOSPITAL.

See CHARITY, 15.

FRAUD.

And see DEEDS, c. 1, 2, 3.—DEVISE, 86, 87.

1. Refusal after marriage to perform a previous agreement to settle is a fraud, against which equity will relieve. *Dundass v. Dutens*, Vol. i. 199.

2. Renewal of a lease obtained by collusion between lessee and steward of lessor for an inadequate consideration: bill to set it aside on refunding the money paid: after answer submitting to that on receiving the money with interest, plaintiff by amended bill prayed either, as before, or that defendant should keep the lease, and pay the full fine; which, on account of the fraud, was decreed with interest at 4 per cent. on the residue from signing the lease, and costs: but credit to be given for the money originally paid with interest: and failing the lessee the steward to pay. *Lord Abingdon v. Butler*, Vol. i. 206.

3. Fraud in obtaining delivery of a lease, the execution of which was obtained *bonâ fide*, affects it equally, as if used to obtain the execution, delivery making it a lease. *Ibid.* 208.

4. Servant taking by collusion more than belongs to his office must account: so must a stranger upon a bargain with a servant, which is a fraud on the master. *East India Company v. Henchman*, Vol. i. 289.

5. Factor buying goods, which he ought to furnish as factor, taking the profits, and dealing with his constituent as a merchant instead of taking factorage duty or a stipulated salary, must account: so must a manufacturer, who obtained by collusion an unfair price. *Ibid.* 289.

6. Costs as between attorney and client against parties to a fraudulent bankruptcy, except those who discovered and gave evidence: and the attorney deprived of the office of Master extraordinary, and committed. *Ex parte Thorp*, Vol. i. 394.

7. Trustees, who joined with remainder-man to eject *cestuy que trust* for life, not excused from making good the whole rent reserved by subsequent accidental deficiencies. *Kaye v. Powel*, Vol. i. 408.

8. One partner retired: the others continued in partnership, and failed: in the interval large sums were paid to him, who retired, in respect of a balance due to him on account: under the bill of the assignees of the last partnership upon circumstances of fraud an account was decreed against the partner, who retired, with respect to the period of the last partnership, and refused as to the previous time. *Anderson v. Maltby*, Vol. ii. 244.

9. New trial refused after two verdicts against deeds and a will for fraud. *Bates v. Graves*, Vol. ii. 287.

10. Instruments being absolutely set aside for fraud, there ought not to be a re-conveyance by the party, who took under them. *Ibid.* Vol. ii. 287.

11. Where there is a conveyance =

and possession is retained, towards all third persons the ownership is not divested: but where deeds are set aside between the parties themselves and the heir of the party conveying, it must be upon actual fraud; and the retaining is only evidence; which with reasonable proof of weak capacity will be sufficient. *Ibid.* 292.

12. Where deeds are set aside for fraud, but the estate has been conveyed to a third person, as an instrument, not privy to the fraud, or where they are set aside on paying so much money, a re-conveyance ought to be decreed. *Ibid.* 295.

13. *A.* having an estate in fee of 6000*l.* a year, and being tenant for life without impeachment of waste of another estate of 5000*l.* a year, with the reversion in fee after an estate in tail male in *B.*, his only son by a former marriage, became indebted by mortgage, annuities and otherwise, to the amount of near 100,000*l.* *A.* and *B.* joined in conveying both estates to trustees upon trust by sale or mortgage, sale of timber, or by rents and profits, to pay debts, and to apply so much of the rents and profits of what should remain unsold, as should seem meet to them, as a sinking fund, and to pay the residue to *A.* and to settle the remaining trust estates, subject to an annuity of 1000*l.* to *B.* for the joint lives of him and *A.*, upon *A.* for life without impeachment of waste, with power to lease for 21 years only; remainder to trustees to preserve, &c.; remainder, subject to a jointure to the wife of *A.* and portions for children by her, to the joint appointment of *A.* and *B.*; in default thereof to the appointment of *B.* surviving; in default thereof to *B.* in tail male; remainder to the other sons of *A.* in tail male; remainder to *B.* in tail; remainder

to the daughters of *A.* in tail with cross remainders; remainder to *B.* in fee; with powers of leasing and full powers of management in the trustees, and a provision for the appointment of new trustees, as vacancies should happen. The trustees raised 50,000*l.* by mortgage of the settled estate, which they applied to the debts; and they paid 2500*l.* a year to *A.* and 1000*l.* a year to *B.* from the date of the settlement. Upon the bill of *A.* to set aside the deed, except the trust for the debts, upon a general charge of fraud, misapprehension and misrepresentation, or to control the management of the trust, and for an account against the trustees, the court held 1st, that the deed could not be set aside partially for fraud; nor under this bill totally; for then the prior estates in the settled estate must be revested clear of incumbrances, *A.* being under covenant to exonerate; and the mortgagees, who must either consent to change their securities, or be paid, were not parties: 2dly, that general charges of fraud required no answer, and could not support a decree; that upon the evidence there was no fraud or mistake; and that *B.*'s joining to subject the settled estate was sufficient consideration: 3dly, that the Court would not interfere with the trustees, there being no misbehaviour; and that the payment of the annuity to *B.* was good. The bill therefore was dismissed with costs; and the trustees having been always ready to account, the Court refused to retain it for that purpose; but without prejudice to a bill for that only. *Myddleton v. Lord Kenyon*, Vol. II. 391.

14. Bill for specific performance of an agreement to grant a lease to the plaintiff would, on evidence of his fraud, misrepresentation, and

insolvency, have been dismissed with costs, if not compromised. *Willingham v. Joyce*, Vol. III. 168.

15. This Court having jurisdiction *in personam* upon equity arising out of transactions concerning lands abroad, particularly if in the British dominions, a purchase of an estate in the West Indies by a creditor under his own execution was, upon the circumstances, held only a security for the debt, the expenses of the proceeding, and incumbrances paid by him, with interest; and subject thereto a reconveyance was decreed. *Lord Cranstown v. Johnston*, Vol. III. 170.

16. Upon a deed of composition, one creditor was prevailed upon by the debtor to represent his debt below the real amount; receiving notes for the dividend upon the remainder, and bonds for the remainder of his debt beyond the amount of the dividend: upon the bill of the debtor and a creditor, party to the deed, the bonds were decreed to be delivered up: but the Court was of opinion the defendant would be entitled to the benefit of the notes, after all the trusts of the deed were satisfied; though not as against the creditors; and directed an inquiry as to that, reserving the question. *Eastabrook v. Scott*, Vol. III. 456.

17. Creditor, at the desire of his debtor, about to marry, gives in a false account of his demand to the father of the intended wife: after the marriage the creditor is bound even as against the debtor. *Ibid.* 461.

18. Though generally a bill by those interested in the personal estate, as creditors or next of kin, will not lie against a debtor to the estate; it will under circumstances as a case of collusion with the representatives. The defendant was

held also liable in the character of trustee and agent. *Doran v. Simpson*, Vol. IV. 651.

19. Sale, by the owner, of the command of a ship in the service of the East India Company, without their knowledge, is illegal, and cannot be the subject of an action. *Kennell v. Abbott*, Vol. IV. 815.

20. On the ground of fraud a general account was decreed; and the securities to stand only for the balance: though the vouchers had been destroyed by general consent. *Wharton v. May*, Vol. V. 27.

21. Bill to set aside the sale of a reversion dismissed with costs: the only ground on the evidence being inadequacy of price; and no fraud &c.; and the bill filed twelve years after the sale. *Moth v. Atwood*, Vol. V. 845.

22. An old head of equity, that if a representation is made to a man, going to deal on the faith of it in a matter of interest, the person making the representation, knowing it false, shall make it good; and the jurisdiction assumed by courts of law in such cases will not prevent relief in equity. *Evans v. Bicknell*, Vol. VI. 182.

23. Consequences of permitting an action for an injury sustained by giving credit upon a false representation by the defendant. *Ibid.* 186.

24. If the intention is fraudulent, though not pointing exactly to the object accomplished, yet the party is bound. *Ibid.* 192.

25. Sale of an annuity by an attorney to his client set aside under the circumstances. *Gibson v. Jeyes*, Vol. VI. 266.

And see ATTORNEY AND CLIENT, 3.

26. A separate agreement, securing to some creditors, who had executed a deed of composition, a

FRAUD.

greater advantage than the other creditors would have under the deed, and without their knowledge, cannot be enforced. *Marwson v. Stock*, Vol. vi. 300.

27. Distinction between a deed void at law for covin and voidable in equity for fraud. *Attorney-General v. Vigor*, Vol. viii. 283.

28. When from the evidence it appeared to be a case for an action for damages for fraudulent representation of another's circumstances, Court refused to relieve, the charges of fraud not being supported. *Quere*, when relief cannot be had so speedily and effectually at law, if the Court may not interpose a concurrent jurisdiction. *Clifford v. Brooke*, Vol. xiii. 131.

29. Voluntary deed in favour of a keeper of a madhouse by a party a boarder in his house, and though not a patient, yet under undue influence, not permitted to stand. *Wright v. Proud*, Vol. xiii. 136.

As within the general principle of guardian and ward, so of attorney and client, whilst the relation subsists. *Ibid.* 138.

30. When from the nature of the deeds themselves, the circumstances under which they were executed, the relation of the parties by and from whom they were obtained, it appeared that the parties acted throughout under undue influence and utter ignorance of their right and of the interests they passed. The Court confirmed the decree setting them aside after a lapse of 17 years, directing them to stand as securities for any balance that might eventually appear to be due. *Purcell v. M'Namara*, Vol. xiv. 91.

31. In general cases, where a debt is cut down by the policy of the law, the complaint may be by *particeps criminis*. *Kirk, ex parte*, Vol. xv. 469.

32. Creditor, by suppressing his

FRAUDS, STATUTE OF. 175

debt, inducing another person to enter into a contract, not permitted to set up the debt even against the person, in whose favour and at whose instance he made the suppression. *Dalbiac v. Dalbiac*, Vol. xvi. 125.

33. Assignment of furniture, &c. by a debtor to his creditors in satisfaction of their debts, retaining possession under a demise at a rent, and afterwards taking a re-assignment from some on payment of their debts, with interest, though it would be void as against creditors, established between the parties against the answer, insisting, that the deed, though absolute upon the face of it with a fraudulent purpose, was intended only as a security; and the circumstances precluding any legal remedy. *Baldwin v. Cawthorne*, Vol. xix. 166.

34. Grant of annuity void for want of a memorial registered; being charged on an estate of less annual value than the annuity; the grantor, being the grantee's attorney, preparing the security, and depositing the title deeds; but misrepresenting the value of the estate: proof admitted under his bankruptcy only for the money advanced, with liberty to file a bill for an equitable lien upon the fraud and the deposit. *Ex parte Wright*, Vol. xix. 255.

FRAUDULENT DEVISES, STATUTE OF.

Construction upon the statute of fraudulent devises. *Howe v. Chapman*, Vol. iv. 550.

FRAUDS, STATUTE OF.

And see AGREEMENT, *passim*.—DE-
VISE, 100.

1. Agreement in writing between landlord and tenant, signed by the

landlord, for a new lease to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed: but blanks were left for the day of the commencement: the repairs being completed, the landlord tendered a lease to commence from that time; and on refusal filed a bill: the answer admitted, that the agreement was accepted; but insisted, that the new lease was not to commence till the expiration of the old; and so it was decreed; parol evidence being refused. *Pym v. Blackburn*, Vol. III. 34.

2. Provision by will increased upon evidence of the testator's request to the executor and residuary legatee and his promise; upon which the testator refused to make a new will; and said he would leave it to the generosity of the executor. *Barrow v. Greenough*, Vol. III. 152.

3. Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expense, and continuance of possession after the expiration of the old lease, and payment of an increased rent under the agreement: plea of the statute of frauds ordered to stand for an answer, with liberty to except. *Wills v. Stradling*, Vol. III. 378.

4. Trust raised by implication from letters, and a paper referred to by them, and in the hand-writing of the party, though not signed or dated; and by operation of law from advances of money. *Forster v. Hale*, Vol. III. 696.

5. The statute of frauds requires, not that a trust shall be created by writing, but that it shall be proved by writing; which may be subsequent to the commencement of it. *Ibid.*

6. The Court has gone too far in taking cases out of the statute of

frauds on the ground of part-performance of an agreement: the relief ought to have been confined to compensation. *Ibid.* 712.

7. Bill for specific performance of a parol agreement to grant a lease for 20 years: plea, statute of frauds, and answer denying that facts alleged as a part-performance were so done: plea was saved to the hearing, with liberty to except the Chancellor inclining to the opinion, that though the agreement was admitted, the statute might be used as a defence to the suit. *Moore v. Edwards*, Vol. IV. 23.

8. Bill for specific performance of a similar agreement, charging possession taken and other acts of part-performance: plea of statute, and answer not denying the acts alleged as part-performance, but stating, that being advised, he entered as tenant at will, he gave notice to quit: plea overruled. *Bowers v. Cator*, Vol. IV. 91.

9. Though payment of a substantial part of the purchase-money will take an agreement as to land out of the statute of frauds on the ground of part performance, payment of a small part, as five guineas, the purchase-money being 100, will not do. Plea of statute allowed, with an intimation of the Court, that, under the circumstances, the bill would be dismissed with costs. *Main v. Melbourne*, Vol. IV. 720.

10. Difference between the 5th and 6th sections of the statute of frauds. *Ilchester, Earl of, ex parte*, Vol. VII. 372.

11. Principle, upon which instruments not duly attested according to the statute of frauds are rejected, and even one part may have effect, as to the personal estate, though not as to the real; not even raising a case of election. *Ibid.* 375.

12. Upon bill filed by the heir, against a devisee alleging a secret

charitable trust void by the statute of mortmain: a plea of the statute of frauds was ordered to stand for answer, with liberty to except. *Strickland v. Aldridge*, Vol. ix. 516.

13. Court will, upon the ground of fraud, compel a discovery, whether a devise was obtained or prevented by the undertaking of the heir or devisee to certain acts. *Ibid.* 519.

14. Sales by auction (except judicial sales) are within the statute of frauds, requiring the terms of agreement to be in writing; where therefore the receipt for the deposit, the only memorandum, was silent as to the terms, price, &c. specific performance was refused. *Blagden v. Bradbear*, Vol. xii. 466.

15. It is immaterial what admissions are made by a defendant insisting upon the statute, for he throws it upon the plaintiff to show a complete written agreement. *Ibid.* 471.

16. Sales by auction are within the statute of frauds, not as a general proposition, but on the ground that there is a contract in writing to satisfy the statute: so sales by brokers stand upon the same evidence; and it is immaterial that the vendor is also the auctioneer. But payment of the auction duties is not a part-performance within the statute; for it must be paid, whether the contract for sale be effectual or not. *Buckmaster v. Harrop*, Vol. xiii. 456.

17. Defendant to a bill for specific performance of an agreement within the statute of frauds may, by answer, admitting the agreement, take advantage of the statute. *Reeve v. Teed*, Vol. xv. 375.

18. A party entitled to a term being obliged to rebuild a party wall, his landlord promised verbally to grant an extension of the term of

ten years; and upon a bill to compel a specific performance, relied upon his having built the wall as a part-performance to take the agreement out of the statute: but held that it was not an act unequivocally resulting from the agreement, as it would have taken place equally if there had been no agreement. *Frame v. Dawson*, Vol. xiv. 386.

19. Bill of specific performance: plea to the relief and to the discovery, except (stating the particulars) of the statute of frauds, with an averment that there was no contract in writing, signed, &c. unless the note in the bill mentioned can be so considered; and for answer (as to the reputed particulars) admitting the note, &c. overruled, as tendering an immaterial issue. *Morison v. Turnour*, Vol. xviii. 175.

20. Whether a note written in the third person, "Mr. T. proposes," &c. (making an offer to purchase) being accepted, amounts to a contract in writing, signed, within the statute of frauds. *Quere. Ibid.*

FRAUDULENT CONVEYANCES.

See COVENANT, 12.

FRIENDLY SOCIETY.

1. The statutes 33 Geo. 3. c. 54. giving preference to friendly societies, having money due to them from their officers dying or becoming bankrupt or insolvent, does not extend to debts due from them individually, and not in their official character. *Ex parte The Amicable Society of Lancaster*, Vol. vi. 98.

2. Whether the preference to friendly societies under the statute 33 Geo. 3. would prevail against the crown. *Quere.* Vol. vi. 99.

3. A person in the habit of re-

ceiving the money of a friendly society, having no treasurer appointed, upon notes carrying interest, payable a month after demand, is not an officer of the society, so as to entitle them to a preference under the statute 33 Geo. 3. c. 54. § 10. *Ex parte Ashley*, Vol. vi. 441.

4. Money paid by order of a friendly society from time to time upon notes carrying interest, there being no treasurer appointed, is not money in the hands of the party by virtue of any office within the act of parliament 33 Geo. 3. c. 54. § 10. entitling the society to a preference in case of bankruptcy. *Ex parte Ross*, Vol. vi. 802.

5. Court having once jurisdiction by petition under the friendly society act, subsequent orders may be made on motion. *Ex parte Friendly Society*, Vol. x. 287.

6. The preference given to friendly societies by the statute 33 Geo. 3. c. 54. § 10. over other creditors, is confined to debts in respect of money in the hands of their officers by virtue of their offices, and independent of contract; therefore does not extend to money held by the treasurer upon the security of his promissory note, payable with interest upon demand. *Ex parte Stamford Friendly Society*, Vol. xv. 280.

FREE BENCH.

See COPYHOLD, 5.

GIFT.

1. The mere shifting a mortgage security from one drawer of a bureau to another by testator's direction, in pursuance of a declared intention to give the sums secured to his daughter, and subsequent declarations that they were her pro-

perty, held not sufficient to pass the property. *Quere*, If a mere delivery of the security passes the interest in the money secured? *Bryson v. Brownrigg*, Vol. ix. 1.

2. Court dismissed a bill calling upon executors to complete a voluntary deed of gift made by the testator in his lifetime to the plaintiff, his daughter, of canal shares, upon which he had indorsed an assignment of his interest to her; but appeared never to have delivered them, or parted with the possession of the instruments; and had afterwards given her a marriage portion, which was agreed to be accepted in full of all other claims upon the father's property; and it was shown that up to the time of his death he had considered himself as the owner of such shares. *Antrobus v. Smith*, Vol. xii. 39.

3. Where a voluntary conveyance kept in the party's possession has been held to operate against his will, there was a complete conveyance and transfer of the property. *Ibid.* 46.

4. Executors only called upon to perfect a gift *inter vivos*, in the cases of a defective execution of a power, or to supply the surrender of a copyhold. *Ibid.* 47.

And see DONATIO CAUSA MORTIS.

GRANDCHILD.

And see CHILDREN, 2. 5.—ISSUE, 2.—LEGACY, [K.] 58. 62.—MAINTENANCE, 8, 9, 10. 14, 15. 18, 19.

No interest by way of maintenance upon a legacy simply to a grand-child or a natural child. *Perry v. Whitehead*, Vol. vi. 546.

GRANT.

1. Grant to be taken as strongly

in favour of the objects and against the grantor, as fair inference can allow. *Swann v. Fonnereau*, Vol. XII. 48.

2. A qualification in the grant of a living to a college, that the senior fellow to be presented should not, the time such living became vacant, "be presented, instituted, or inducted into any other living:" satisfied by the previous resignation of another living. *Hayes v. Exeter College*, Vol. XII. 236.

3. A resignation sent by the post duly attested, received by the bishop, indorsed as accepted by him, sufficient. Acceptance is not a judicial, but a domestic act, requiring no registration. *Ibid.*

GUARANTEE.

See SURETY, 12, 13.

GUARDIAN.

And see INFANT, *passim*.

1. The proper application to change a guardian is by petition. *Ex parte The Earl of Ilchester*, Vol. VII. 348.

2. The testator, married, but not then having children, gave the guardianship of all his daughters born or to be born to his wife, and of all his sons hereafter to be born to his wife and his brother, or the survivor. The guardianship extends to all the children by that or a future marriage. *Ibid.*

3. Testamentary appointment of guardian not revoked by a subsequent testamentary appointment, not executed according to the statute, and not directly importing revocation. *Ibid.*

4. Court set aside a conveyance of an advowson from a ward to her guardian after a lapse of 20 years,

upon grounds of public justice. *Semble*, it is almost impossible in the connexion of guardian and ward, trustee, &c., that a transaction purporting to be bounty for the execution of antecedent duty shall stand. *Hatch v. Hatch*, Vol. IX. 292.

5. Infant residing abroad, his father, not interested in the suit, assigned as guardian for the purpose of putting in his answer. *Jongsma v. Pfiel*, Vol. IX. 357.

6. Under circumstances of gross ill-treatment and cruelty exercised towards the infants by their father, a guardian and maintenance allowed. *Whitfield v. Hales*, Vol. XII. 492.

7. Where a married woman was appointed guardian of an illegitimate child, the Court made an order for payment to her upon her separate receipt. *Wallis v. Campbell*, Vol. XIII. 517.

8. Order for the appointment of a person to act as guardian (the father being living), and for a reference as to maintenance, but not for a receiver, upon a petition, without any suit instituted. *Ex parte Mountfort*, Vol. XV. 445.

9. Appointment of a guardian by an unattested will made good by a codicil, with three witnesses, on the same paper, referring to the will, as annexed, making some alterations as to legacies, and confirming it in all other respects; as the case of a devise of land. *De Bathe v. Lord Fingal*, Vol. XVI. 167.

10. Order, appointing a guardian without a reference, only where the property is excessively small. Refused where it amounted to 1,500*l.* *Ex parte Wheeler*, Vol. XVI. 266.

11. Act of guardian without authority, if beneficial to the infant, protected. *Milner v. Lord Harewood*, Vol. XVIII. 273.

INCLOSURE ACTS.

And see JURISDICTION, 30.

1. Specific performance of a contract for sale of an allotment under an inclosing act before the award; the act expressly enabling a sale, and declaring the conveyance valid before the award; and the purchaser having notice of the circumstances. *Kingsley v. Young*, Vol. xviii. 207.

2. Award under inclosing act rather evidence of, than constituting title. *Ibid.* 208.

3. Objection by a purchaser of allotments under an inclosing act, that the award of the commissioners was not made, overruled; the act containing a clause enabling a sale, and declaring the conveyance valid before the award; and supposing the possibility of the commissioners varying the allotments, the purchaser having full notice of all the circumstances. *Kingsley v. Young*, Vol. xvii. 468.

INCUMBRANCE.

1. A subsequent incumbrancer without notice, in order to protect himself must have as good a right, and must either get in the legal estate, or possess himself of the deed creating the term. *Maundrell v. Maundrell*, Vol. x. 260.

2. Unless there are circumstances to give the prior incumbrancer a right to call for an assignment. *Ibid.* 270.

3. Distinction between the cases of dower and a mesne incumbrance, as to the effect of a notice, that it prevents a preference in the latter, not in the former. *Ibid.* 261. 271.

INFANT.

And see ACCOUNT, 8.—MAINTENANCE, *passim*.

1. Infant ought not to wait till of age but to sue by his next friend. *Blake v. Bunbury*, Vol. i. 194.

2. Infant liable for necessities, but more consideration had for a stranger advancing him money than a trustee. *Davis v. Austen*, Vol. i. 249.

3. Infant not bound by his covenant. *Johnson v. Boyfield*, Vol. i. 314.

4. An infant, to express his consent, joins in a settlement made by a woman in contemplation of marriage with him; he is bound thereby, if made on a fair consideration and no fraud; as where the transaction is public and with consent of the family; though his being privy would not have concluded him from any rights as being an infant. *Strathmore v. Bowes*, Vol. i. 28.

5. Conveyance by a woman under any circumstances, and even the moment before marriage, good, *prima facie*; bad only if fraud, as where made pending the treaty without notice. *Ibid.*

6. Where an infant is sole executor, administration shall be granted to the guardian, or such person as the Spiritual Court shall think fit, till the infant is twenty-one; at which time and not before probate shall be granted to him. *Ex parte Sergison*, Vol. iv. 149.

7. A child *en ventre sa mère* may be vouched, may be an executor, may take under the statute of distributions, by devise, under a charge for portions, may have an injunction and a guardian. *Thellusson v. Woodford*, Vol. iv. 322.

8. A child *en ventre sa mère* is a life in being to all intents and pur-

poses, except in the case of a descent at common law. *Ibid.* 334.

9. The object of the statute 10 and 11 W. 3. c. 16. was not to affirm the case of *Reeve v. Long*: but it established, that the same principle should govern, where the limitation was by deed of settlement. *Ibid.* 342.

10. The Court never makes an order for taking an infant out of its jurisdiction. *Mountstuart v. Mountstuart*, Vol. vi. 363.

11. Order for liberty to let an infant's estate, without reference to the Master; the property being small: but not to extend to building leases, nor beyond minority. *P— v. Bell*, Vol. vi. 419.

12. Personal property of an infant ordered to be laid out in the purchase of land, though there was no authority in the will for changing the nature of the property: but it was ordered, that the estate purchased should be conveyed in trust for the infant, his executors and administrators, till he should attain twenty-one, and afterwards for him and his heirs. *Lord Ashburton v. Lady Ashburton*, Vol. vi. 6.

13. General rule, that a trustee shall not of his own authority break in upon the capital of an infant's fortune. *Walker v. Wetherell*, Vol. vi. 473.

14. The Court did not call in the property in an infant, upon security in India; the Master reporting to be for his benefit that it should remain. *Sadler v. Turner*, Vol. viii. 617.

15. Where the will directs it to go with the freehold as far as the rules of law will permit. *Quere*, How far a leasehold estate shall be unalienable? Where trustees of an infant tenant in tail had vested the rents and profits in purchase of the land tax, not being persons having

an estate of inheritance within the meaning of the act, held by analogy, to the option to be reserved by guardians, &c. under the act, that the money so applied should be charged upon the estate in the remainder-man for the benefit of the personal representative. *Ware v. Polhill*, Vol. xi. 279.

16. Tenant in tail, adult, paying off an incumbrance, a presumption arises that his intention was not to keep alive the charge; but in case of an infant, the Court always guards against a change in the nature of the property, that the representative shall not be prejudiced. *Ibid.* 278.

17. So the infant's estate will be reimbursed by a charge, even though the securities are cancelled. *Ibid.* 283.

18. Upon bill filed by the next friend of two natural children infants, it was afterwards discovered that a recovery had been suffered of property devised, and the heir recovered accordingly in ejectment; bill dismissed as against the heir and widow with costs, the fact of the recovery might with reasonable diligence have been known before the bill filed. *Pearce v. Pearce*, Vol. ix. 548.

19. Trustee or next friend of an infant acting fairly, is entitled not only to his costs but his charges and expenses under the head of just allowances. *Fearn v. Young*, Vol. x. 184.

20. An order appointing a guardian for an infant defendant may be granted on the motion of plaintiff. *Williams v. Wynn*, Vol. x. 159.

21. An infant defendant being abroad cannot, upon motion, have a guardian assigned to put in an answer, but a commission must go. *Tappen v. Norman*, Vol. xi. 563.

22. No exceptions can be taken to the answer of an infant, however insufficient, cause therefore against

an injunction can only be upon the merits. *Lucas v. Lucas*, Vol. XIII. 274.

23. Exception out of common law bars forfeitures, by fine, final judgment in a writ of right, descent after disseisin, copyhold heir not coming in to be admitted upon the proclamations in favour of infancy, non-sane memory, or absence beyond sea. *Beckford v. Wade*, Vol. XVII. 89.

24. Where the words of a law in their ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature manifested by other parts of the law, from the general purpose and design of the law, and the subject matter of it.

25. Thus the statutes of limitation and of fines would have bound infants, &c. without an express exception. *Ibid.* 92.

26. Interest of an infant not affected by the recital of a deed made during infancy. *Chambers v. Brailsford*, Vol. XVIII. 374.

27. Though a female infant is not bound by an agreement on marriage to settle her real estate, if she does not, when of age, choose to accede to it, her husband would not be permitted to aid her in defeating it; nor is her act during coverture effectual. *Milner v. Lord Harewood*, Vol. XVIII. 276.

28. Partial accession, at the age of twenty-one, to a settlement by a female infant, an election, to abide, by the whole. *Ibid.* 277.

29. Incapacity of infant to elect. *Forbes v. Moffatt*, Vol. XVIII. 393.

30. Distinction between the general jurisdiction of the Court of Chancery in the case of an infant and in lunacy. *Ex parte Phillips*, Vol. XIX. 122.

31. The Court acts for an infant as a trustee, changing property for

his benefit, but so as not to affect his power over it even during infancy, for instance, his testamentary power over personal property. *Ibid.* 122.

32. Jurisdiction to direct inquiry as to the marriage of an infant; whether of sound mind at the time, and whether for the infant's benefit that a commission should issue. *Sherwood v. Sanderson*, Vol. XIX. 289.

INFANT TRUSTEE.

1. An infant trustee ordered to convey an estate in Calcutta under the statute 7 Anne, c. 19. *Ex parte Anderson*, Vol. V. 240.

2. Order upon petition under the statute 7 Anne, c. 19. for an infant trustee to convey to the persons absolutely entitled, or as they shall appoint; but not to convey to a new trustee, upon trusts to be executed, without a bill. *Ibid.*

3. The costs of an infant trustee upon an order to convey under 7 Anne, c. 19. allowed. But the Court said, that a motion to commit the mother of the infant for not permitting him to convey was an improper mode of obtaining the opinion of the Court upon a point of practice. *Ex parte Cant*, Vol. XVIII. 554.

4. Infant trustee within the statute 7 Anne, c. 19. notwithstanding an interest as co-executor, and co-residuary legatee, entitled to the mortgage money; the receipt and discharge of the other executor leaving the infant as mere trustee. — *v. Handcock*, Vol. XVII. 383.

5. Infant trustee within the statute 7 Anne, c. 19. must be a dry trustee. *Ibid.* 384.

6. Conveyance by infant trustee voidable, as not within the statute;

if he would be bound to convey when adult, he would in equity be restrained from setting it aside. *Ib.* 384.

INFANT MORTGAGEE.

1. An infant may be foreclosed, subject only to error. *Bishop of Winchester v. Beavor*, Vol. III. 317.
2. Copyhold lands mortgaged in fee by lease and release as freehold: the customary heir is bound by a covenant for farther assurance: but during his infancy the Court refused to foreclose; and would go no farther than directing the account, and that in default of payment, the plaintiffs should be let into possession, and hold and enjoy till the heir should attain twenty-one, at which time he should surrender; and a day was given to show cause against the Decree. *Spenser v. Boyes*, Vol. IV. 370.
3. Payments to infants during minority to be discountenanced. *Ibid.* 369.
4. Estate in Ireland ordered to be conveyed by an infant mortgagee under the statute 7 Anne, c. 19. *Evelyn v. Forster*, Vol. VIII. 96.
5. The order under the statute 7 Anne, c. 19. for the reference to the Master, as well as that for the infant to convey, must be on petition, not on motion. *Ibid.*
6. Decree of foreclosure against an infant, with a day to show cause. This has been altered since in *Munday v. Munday*, 1 Ves. and Bro. 223. directing, in case the mortgagees consent to a sale, an inquiry whether it will be for the infant's benefit. *Goodier v. Ashton*, Vol. XVIII. 83.
7. Female infant not bound by agreement to settle her freehold estate on marriage, without an op-

tion when twenty-one to refuse, but her husband, under the circumstances, claiming a special occupant; the subject being leaseholds for lives, frequently during and since the coverture renewed, by the husband who had settled his own estate, the settlement confirmed by her repeated acts and fines, though not of the life estates, and by orders of Court, children having existed, though deceased under age, no claim for many years; and during eighteen, an adverse possession against a former heir by the husband; the bill claiming not against his assets, but merely an account since his death against this devisee for life, whose possession commenced long since the fall of the surviving life in the original leases. *Milner v. Lord Harewood*, Vol. XVIII. 259.

INHABITANT.

See CURACY, 2.

INJUNCTION.

See MAINTENANCE.—COPYRIGHT, *passim*.

- [A.] WHERE GRANTED.
- [B.] WHERE NOT.
- [C.] PRACTICE ON.

[A.] WHERE GRANTED.

1. Injunction cause stood over at hearing for want of parties: injunction not dissolved, nor receiver appointed on motion without special case of waste: but plaintiff compelled to speed the cause. *Price v. Williams*, Vol. I. 401.
2. Injunction, that the validity of a patent might be tried at law; verdict for the patentee, subject to the opinion of the Court upon a case; the Court equally divided, the

patentee must bring another action; but the Court will not impose any terms upon him, nor dissolve the injunction in the mean time. *Bolton v. Bull*, Vol. III. 140.

3. Injunction against securities obtained by one French emigrant against another by arresting him, when about to sail on the expedition against France, and under an obligation entered into in France as surety, which, according to the laws of France, could not affect a person. *Talleyrand v. Boulanger*, Vol. III. 447.

4. Injunction in pressing cases upon petition and affidavit. In this instance, converting old houses in London to a purpose, that made them dangerous to the public, the Lord Chancellor granted the injunction, but said, the Lord Mayor, by his general jurisdiction, could apply a much more proper and effectual remedy. *The Mayor, Commonalty, and Citizens of London v. Bolt*, Vol. I. 129.

5. Where a tenant defending an ejectment brought by his landlord makes default at the trial, and makes use of the interval to do all the mischief he can by breaches of covenant and wilful waste, an injunction will be granted on motion, or in the vacation on petition; but it was refused where no ejectment had been brought. *Lathropp v. Marsh*, Vol. I. 259.

6. Injunction granted to restrain a breach of covenant, secured by forfeiture of the lease and a penalty. *Barrett v. Blograve*, Vol. V. 555.

7. Injunction to restrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct; amounting to a consent to the plaintiff's plan of improvement, laying out the lawn, &c. *Jackson v. Cator*, Vol. V. 688.

8. Sending a surveyor to mark out

trees is a sufficient ground for an injunction. *Ibid.* 688.

9. Injunction restraining a transfer, and a receiver appointed, to preserve the property during a litigation in the ecclesiastical Court upon the will. *King v. King*, Vol. VI. 172.

10. Injunction where there can be no account. *University of Oxford v. Richardson*, Vol. VI. 705.

11. Injunction to prevent that, which is unjustly done, or threatened. *Ibid.* Vol. VI. 706.

12. Injunction granted or continued to the hearing, though the legal title doubtful; as upon patent rights. *Ibid.* 707.

13. Injunction in Chancery in the vacation; the Court being always open. *Temple v. Bank of England*, Vol. VI. 771.

14. Injunction on affidavit to restrain the tenant of a farm breaking up meadow, contrary to express covenant, for the purpose of building. Whether, if no express covenant, it would do upon the ground of waste, *Quere.* *Lord Grey de Wilton v. Saxon*, Vol. VI. 106.

15. Where the defendant having begun to take coal in his own land had worked into that of the plaintiff. *Mitchell v. Dors*, Vol. VI. 147.

16. Lessee committed waste by opening a mine, and continued the work into other land of the lessor, not comprised in his lease. Injunction as to both. *Hanson v. Gardiner*, Vol. VII. 308.

17. Injunction in the case of trespass to prevent irreparable mischief. *Ibid.* 308.

18. Injunction in the case of trespass to prevent the multiplicity of suits. *Ibid.* 310.

19. Injunction between tenants in common against destruction; not against pure equitable waste. *Hole v. Thomas*, Vol. VII. 589.

INJUNCTION.

20. Injunction in trespass. *Smith v. Collyer*, Vol. viii. 90.

21. Court does not order repairs to be done, but by injunction will create the necessity of completely doing it, as where defendant suffered the banks, locks, and stopgates of a canal, by which plaintiff used his mills, Court granted an order restraining him from impeding plaintiff in the use, &c. by continuing such banks, &c. out of repair. *Lane v. Newdigate*, Vol. x. 192.

22. Tenant colluding with trespasser in committing acts of waste, cutting timber, &c. the act has so much of the tenant's quality as to make it the object of injunction. *Courthope v. Mapplesden*, Vol. x. 290.

23. Injunction granted against a foreign attachment, obtained against the goods of two joint partners after an act of bankruptcy and separate commission, overreaching the attachment by relation to the act of bankruptcy. *Barker v. Goodair*, Vol. xi. 78.

24. So an execution after an act of bankruptcy committed is no bar to the assignees recovering the property. *Ibid.* 84.

25. Injunction against darkening ancient windows, not in every case, affecting the value of premises, that would support an action: the effect must be, that material injury, amounting to nuisance, which should, not only be redressed by damages, but upon equitable principles be prevented. *Ibid.*

26. Injunction granted against a lord of a manor opening mines upon the lands of a copyholder. *Grey v. Duke of Northumberland*, Vol. xiii. 236.

27. Injunction, on motion of course to deliver possession of land decreed; as a ground for the writ of assistance, the only mode of obtaining possession: a court of equity

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properly acting only *in personam*. *Huguenin v. Baseley*, Vol. xv. 180.

28. Injunction extended to trespass. *Norway v. Rowe*, Vol. xix. 147.

29. Injunction against waste: defendant insisting on his own title; but admitting possession received from plaintiff's tenant without his knowledge. *Ibid.* 154.

30. Distinction on injunction between the Courts of Chancery and Exchequer. *Noble v. Garland*, Vol. xix. 376.

[B.] WHERE NOT.

And see SEWERS.

1. Injunction to restrain waste not granted against defendant in possession, claiming by an adverse title. *Pilsworth v. Hopton*, Vol. vi. 51.

2. Injunction to restrain waste not granted without positive evidence of title. *Davis v. Leo*, Vol. vi. 784.

3. Injunction not binding upon a person not a party in the cause. *Bell v. Phyn*, Vol. vii. 456.

4. No injunction upon belief of an intention to cut timber. *Lord Braybrook v. Inskip*, Vol. vii. 417.

5. Injunction till answer, restraining a transfer of stock, standing in the name of a steward; on strong evidence by affidavit, that it was the produce of his master's property, rents, &c. received for many years without account. Refused as to money at his banker's in his name. *Lord Chedworth v. Edwards*, Vol. viii. 46.

6. Injunction against cutting ornamental timber, confined to timber standing for ornament or shelter: the Court refusing to extend it by inserting the words, "contribute to ornament." *Williams v. M'Namara*, Vol. viii. 70.

7. Injunction against cutting timber refused, where the title was disputed; as between devisee and heir

at law. *Smith v. Collyer*, Vol. VIII. 89.

8. Injunction that an indictment for perjury upon the answer has been found by the grand jury is not a ground for reviving an injunction. *Clapham v. White*, Vol. VIII. 35.

9. Upon a contract for a lease the solvency or insolvency of the tenant is objection of weight; depending upon the circumstances. Upon that and other circumstances an injunction against an ejectment by the landlord was dissolved. *Buckland v. Hall*, Vol. VIII. 92.

10. Lessee remains liable to the determination of the term: assignee only during his possession. *Ibid.* 95.

11. Upon a disputed title to a lease granted by a corporation, a trust being set up against the lessee, a motion being made to compel the corporation to produce surrendered leases, counterparts of renewed leases, &c. no order was made. *Cock v. St. Bartholomew's Hospital, Chatham*, Vol. VIII. 138.

12. Upon a prize to a privateer being condemned and decreed to be a *droit* to the crown for want of a proper letter of marque, held to be the property of the crown, and that this Court would not restrain payment of the proceeds under a treasury warrant: motion dismissed with costs. *Nicol v. Goodall*, Vol. x. 155.

13. After an original bill, full answers put in and no exceptions taken, nor injunction moved for upon the merits upon an amended bill supported by affidavits, Court held that as they left new matters charged unexplained, nor disclosed any reason why such matters were not put on the record at an earlier period, the party was not entitled to the injunction. *Norris v. Kennedy*, Vol. xi. 565.

14. Court refused an injunction to stay trial on the eve of the as-

sizes, where the party declined giving security for costs. *Blacoe v. Wilkinson*, Vol. XIII. 454.

15. On an agreement for sale of the good-will of a business, and using the best endeavours to assist the party and procure customers &c. the Court refused a motion upon affidavit, for an injunction to restrain proceedings at law to recover the premium, before answer the remedy for a breach of such undertaking is by action or issue *quartum damnificatus*. *Shackle v. Baker*, Vol. XIV. 468.

16. Upon an agreement for a lease, to lay out 100*l.* under the direction of plaintiff, under a misrepresentation or concealment of the purpose for which the premises were to be used, the Court granted an injunction to restrain the defendant from converting them into a coach-maker's shop, it effecting a total alteration in the nature of the premises. *Bonnett v. Sadler*, Vol. XIV. 526.

17. Sale, under a commission of bankruptcy, of the waggon trade from Bristol and Bath to London, with the good-will; another concern from Bristol and Bath to Warminster and Salisbury being purchased in trust for the bankrupt: having obtained his certificate, he commenced trade again to London by that road, soliciting customers by advertisement and cards, stating generally, that being reinstated by his friends in the carrying business, his waggons set out at the usual hours, &c. An injunction was refused. *Cruttwell v. Lye*, Vol. XVII. 335.

18. Injunction in trespass, where the title was disputed. *Kinder v. Jones*, Vol. XVII. 110.

19. Injunction against trespass upon irremediable mischief, in nature of waste, on a bill by the lord

of a manor and his lessees, against taking stones, having a peculiar value, found at the bottom of the sea, within the limits of the manor. *Earl Cowper v. Baker*, Vol. xvii. 128.

20. Injunction in the case of trespass by the lord of a manor digging for coal on the premises of a copyhold tenant. From the nature of the subject and the consequences, such an injunction not to be continued without securing the means of a speedy trial. *Grey v. the Duke of Northumberland*, Vol. xvii. 281.

21. Breach of injunction by proceeding against bail. *Leonard v. Atwell*, Vol. xvii. 385.

22. Injunction against draining, preparatory to opening a coal-mine, with prejudice to a canal, before establishing the right at law, refused upon laches for two years, permitting expenditure. *Birmingham Canal Company v. Lloyd*, Vol. xviii. 515.

23. Injunction against using water injuriously to a mill, putting the plaintiff to go to trial forthwith. *Ibid.* 516.

24. Injunction against proceeding at law only on some default either of appearance or answer. *James v. Downes*, Vol. xviii. 522.

[C.] PRACTICE ON.

And see ABATEMENT, 3.

1. On injunction from farther digging a ditch, Court will not order it to be filled up before answer. *Anon.* Vol. i. 140.

2. Injunction bill charging fraud in obtaining verdict: affidavits contradicting the answer read in support of the injunction on the merits. *Isaac v. Humpage*, Vol. i. 427.

3. In ordinary cases no injunction till hearing, unless a ground for it in the answer: but in cases of waste, patents, and irreparable mis-

chief, it will be granted on affidavits after answer. *Ibid.* 430.

4. On motion to dissolve an injunction *nisi* at the last seal after Trinity term the plaintiff cannot have time till the next day of motions upon the usual undertaking to show cause on the merits; but was permitted to show cause during the petitions. *Robinson v. Wardell*, Vol. v. 552.

5. Upon breach of an injunction restraining an act, the proper course is personal service of notice of motion, that the defendant shall stand committed: not the practice to move, that he shall show cause, why he shall not stand committed. *Angerstein v. Hunt*, Vol. vi. 488.

6. Where the injunction is to do a thing, the course is to move, that he shall do it by a particular day, or stand committed. *Ibid.*

7. Obtained on affidavits against cutting and pasturing cattle in a wood; the plaintiff praying the injunction as tenant in fee, or as lord of the manor inclosing under the statute: the defendants denying the former title; as to the latter claiming common of pasture and estovers; and stating, that after the inclosure sufficient common of pasture would not be left; the plaintiff having before the bill filed been nonsuited in an action of trespass, and entered into an agreement with some of the tenants. The injunction dissolved upon the answer. Whether the original and new affidavits could be read in such a case, *Quære*. *Hanson v. Gardiner*, Vol. vii. 305.

8. The injunction, obtained upon a breach of covenant, in nature of a specific performance, dissolved upon the answer, contradicting the affidavits, and showing the consent for several years. *Barret v. Blagrove*, Vol. vi. 104.

9. Injunction not dissolved, pending the reference to the Master for

impertinence. *Fisher v. Bayley*, Vol. xii. 18.

10. An injunction not granted pending a demurrer. *Cousins v. Smith*, Vol. xiii. 165.

11. An injunction may be had of course for want of answer to an amended bill, though not obtained upon the original bill; and upon a slight affidavit may be extended to stay trial as well as execution. In the Exchequer an injunction goes to stay trial in the first instance, in Chancery it only stays execution. *Nelthope v. Law*, Vol. xiii. 323.

12. Parties present in Court during the motion, though not when the order is pronounced, equally guilty of a contempt by breach of the injunction. *Osborne v. Tennant*, Vol. xiv. 136.

13. Upon affidavits of an intended marriage with a male infant, there being a prosecution pending for a conspiracy to take him away from a school, where he had been placed by his guardians, the Court granted an injunction restraining the party from communicating with him, and that service at the last place of abode should be good service, though the house was shut up, part of the fraud suggested being in keeping out of the way to avoid service. *Pearce v. Crutchfield*, Vol. xiv. 206.

14. Service of subpoena necessary in the case of a special injunction; but the practice having been unsettled, the defendant was put to dissolve upon the merits, and the plaintiff permitted to show cause by affidavit. *Att. Gen. v. Nichol*, Vol. xvi. 338.

15. Effect of an injunction in the Court of Chancery: before action commenced staying all proceedings at law: after action commenced permitting the defendant to call for a plea, and proceed to judgment at law, if in a condition to do so; or, if not, to do only what is necessary

to enable him to do so; restraining execution. Therefore, after bail excepted to, ruling the sheriff to bring in the body a breach of the injunction. *Bullen v. Ovey*, Vol. xvii. 141.

16. Injunction extended to stay trial on affidavit, that the plaintiff is advised and believes, that he cannot safely proceed to trial until the answer. *Partington v. Hobson*, Vol. xvi. 220.

17. To extend an injunction to stay trial, the affidavit must state belief, not merely that the defendant cannot safely go to trial, but that the answer will furnish discovery material to the defence in the action. *Appleyard v. Seton*, Vol. xvi. 223.

18. No injunction until appearance or default. *White v. Klevers*, Vol. xviii. 471.

19. The subsequent order, extending an injunction against proceeding at law, to stay trial, not discharged separately, but the injunction, as extended, must be dissolved generally, upon the answer, by the usual order *nisi*, subject to showing exceptions for cause, or the undertaking to show cause on the merits. *Earnshaw v. Thornhill*, Vol. xviii. 485.

20. Distinctions in practice between injunctions to stay waste, or the sale of an estate, and against an action. *Ibid.* 488.

21. Injunction before action commenced prevents the commencement after action, stays execution only in Chancery, differing from the Exchequer, without a distinct application to stay trial. *Ibid.*

22. Injunction extended to stay trial on affidavit that plaintiff cannot safely go to trial without the answer, and believes it will produce a discovery material to his defence. *Ibid.*

23. Contempt by breach of injunction by defendant, present in

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Court during the motion, though retiring before the order pronounced; but motion to commit after a considerable lapse of time, and the order not drawn up, refused, with costs. *James v. Downes*, Vol. XVIII. 522.

24. Injunction dissolved on the answer, not revived of course without special motion on amendments verified by affidavit. *Ibid.*

25. Injunction not dissolved on one answer only coming in to interpleading bill; but plaintiff's delay to get in the other answers is a special ground for application to dissolve, or to have the money out of Court. *Hyde v. Warren*, Vol. XIX. 322.

26. Distinction on injunction in Chancery and the Exchequer; here staying all, if before action; if after, execution only, not trial without a farther motion so to extend it on affidavit of belief, that the answer will be material on the trial. *Noble v. Garland*, Vol. XIX. 377.

27. In injunction cases no affidavit as to the title after answer. *Platt v. Button*, Vol. XIX. 447.

28. Jurisdiction by injunction on danger of irreparable injury to property, though, as public nuisance, an object of prosecution by the Attorney General; the subject a corn-ing house to powder mills, from site, construction, &c. imminently dangerous to the neighbourhood and public. Indictment directed, with an arrangement for a speedy trial, and preventing imminent danger in the interval. *Crowder v. Tinkler*, Vol. XIX. 617.

29. Jurisdiction by injunction, where the effect will be to stop a great trading concern, exercised with caution, not *ex parte*, but on notice, with the opportunity of opposing on affidavit. *Ibid.*

30. Injunction on injurious use

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of a body of water, against using it otherwise than as used before. *Ibid.* 620.

31. Injunction to stay trial on affidavit, that plaintiff cannot safely defend the action without discovery, and that it will give a good and effectual defence, not discharged upon the answer of one defendant only. *White v. Steinwacks*, Vol. XIX. 83.

32. The truth of affidavit to stay trial, that the discovery will be material, not questionable, nor the effect of the discovery considered, unless its immateriality is clear on the face of the bill. *Ibid.* 84.

33. Execution, not trial, staid, where the bill and answer form a defence in equity, though not at law. *Ibid.* 85.

34. Motion for injunction, if made before declaration, stays every thing; if after, stays execution only, not trial. *Garlick v. Pearson*, Vol. X. 452.

35. Injunction can only be obtained by motion in open Court. *Ibid.*

INSANITY.

And see LUNACY, *passim*.

Insanity having been once established against a party, the proof showing sanity is thrown upon him; where it has never before been imputed, the proof of insanity is thrown on the other side, to be made out and applied to the date only of the particular transaction. *White v. Wilson*, Vol. XIII. 88.

INSOLVENT ACT.

Bill by the assignee of a person, who had made a general conveyance in trust for his creditors, and afterwards taken the benefit of an

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insolvent act, in respect of the surplus against the assignee, the trustee, and mortgagees, dismissed, with costs. *Spragg v. Binkes*, Vol. v. 583.

And see ANNUITY, 35.

INSURANCE.

And see ASSURANCE.

1. Insurance without policy is illegal. *Morgan v. Mather*, Vol. II. 18.

2. Variation from the policy, though perfectly immaterial, discharges the insurer. *Rees v. Berrington*, Vol. II. 541.

3. Insurable interest in a trustee, in respect of the legal interest in a ship, as in the *cestui que trust*, a respect of the equitable. *Yallop, ex parte*, Vol. xv. 67.

4. Equitable interest insurable; both trustee and *cestui que trust* have an insurable interest. *Ex parte Houghton*, Vol. xvii. 253.

INTENTION.

Question of intention, to be determined by the Court, not a proper one for the Master. *Pitt v. Lord Camelford*, Vol. I. 83.

INTERPLEADER.

And see LANDLORD AND TENANT, 4. 11.

1. Upon interpleading bill, no costs between the defendants, but are given to plaintiff. *Dawson v. Hardcastle*, Vol. I. 368.

2. A banker, with whom property was deposited for safe custody, refused to deliver it to the owner in person under actions against him as partner in an insolvent house, being attached by the plaintiffs in those

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actions, and held to bail in trover by the owner: held that he was entitled to relief upon bill of interpleader, but need not have come into equity; as at law he would have been discharged on commo bail upon bringing the deposit into Court, and proceedings in the action would have been staid until the attachments were disposed of by the owner in the name of the banker. *Langston v. Boylston*, Vol. II. 101.

3. To support injunction on bill of interpleader affidavits of the facts may be read; it is exactly on the footing of waste. *Ibid.*

4. Collusion not presumed against the affidavit of plaintiff in such bill nor can counter affidavits prevail against it. *Ibid.*

5. A claim is a ground of interpleader. *Ibid.* 107.

6. Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger under a title adverse to that of the landlord. On suspicion of collusion an inquiry into the circumstances was directed; and the report confirming the fraud, the bill was dismissed with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor; the latter to show cause why he should not be struck off the roll. *Dungey v. Angove*, Vol. II. 304.

7. Bill of interpleader is, where two persons claim of a third the same debt or the same duty. *Ibid.* 310.

8. An interpleading bill never suggests a case. To support such a bill by a tenant two persons must claim the same rent in priority of tenure and contract, in cases of mortgagor and mortgagee, trustee and *cestui que trust*. *Ibid.*

9. Upon a bill of interpleader the defendant, who made it necessary,

was ordered to pay all the costs; and the plaintiff has a lien for his costs upon the fund paid into Court. *Aldridge v. Mesner*, Vol. VI. 418.

10. Interpleader upon notice of a variety of claims by persons among whom an entire charge upon an estate was split; though no suit instituted, and but one legal right of entry; the principle being, not merely that the payment cannot be safely made, but that the party entitled to be discharged by a single payment should not be harassed by a number of suits. *Angel v. Had-den*, Vol. xv. 244.

11. Questions arising on bills of interpleader are disposed of in various modes, according to the nature of the question, and the manner in which it is brought before the Court. *Ibid.* Vol. xvi. 202.

12. Interpleading bill is considered as putting the defendants to contest their respective claims; as a bill by an executor or trustee to obtain the direction of the Court upon the adverse claims of the defendants. Therefore at the hearing, if the question between the defendants is ripe for decision, the Court decides it; and, if not ripe for decision, directs an action, or an issue, or a reference to the Master, as best suited to the nature of the case. Accordingly upon objections under the annuity act a reference was directed, whether proper memorials were enrolled, and to state the priorities of such as are valid. *Ibid.*

13. Interpleading bill by a tenant to ascertain to which of two claimants he was to pay his rent. The one establishing his title by evidence, the other making default at the hearing, payment decreed to the former; and a perpetual injunction against the other. *Ibid.*

14. Interpleader on an attorney's

claim of lien upon a sum awarded as damages under a judgment obtained by the client against the plaintiff. — *v. Bolton*, Vol. xviii. 292.

15. Injunction upon an interpleading bill against bankrupts and their assignees by a debtor to the estate, sued by the bankrupts with a view of indirectly contesting the commission. *Lowndes v. Cornford*, Vol. xviii. 299.

16. Interpleader upon colour of title given to a stranger. *East India Company v. Edwards*, Vol. xviii. 376.

INTEREST.

And see BANKRUPTCY [BB.]—EXECUTOR, 30.—EXONERATION, 6.—MAINTENANCE, 25.—MORTGAGE [A.] 13.—POWER, 12.—RECEIVER, 14.—REVERSION, 1.—SPECIFIC PERFORMANCE, 17.—TRUSTEE, 5, *et seq.*—VENDOR AND PURCHASER [B.] 19. 30.

[A.] WHEN ALLOWED.

[B.] WHERE NOT.

[A.] WHEN ALLOWED.

1. Interest given in equity upon a simple contract debt, as at law, upon every debt detained, either by the contract or in damages. *Craven v. Tickell*, Vol. i. 63.

2. Interest decreed against a purchaser for delaying payment. Court cannot make a purchaser appoint a clerk in Court; that is only necessary when the party is to appear. *Child v. Lord Abingdon*, Vol. i. 94.

3. Interest allowed, upon a written agreement to pay by instalments. *Parker v. Hutchinson*, Vol. iii. 133.

4. Interest given at law, upon a written undertaking to pay, or notes payable on a day certain: not upon notes payable at a day uncertain,

shop debts, &c. *Parker v. Hutchinson*, Vol. III. 135.

5. Bond and judgment assigned; interest must be calculated to the date of the report, so as not to exceed the penalty. *Sharpe v. Earl of Scarborough*, Vol. III. 557.

6. A written undertaking to pay at a day certain, or on demand, as a promissory note, carries interest from the day, or the demand; as at law it is given by way of damages. *Upton v. Lord Ferrers*, Vol. v. 801.

7. Devise in trust to sell, and apply the money to and among such persons as the trustees, in their discretion, should think had or have any just or indisputable demand upon A. at his death, to each in equal degree and proportion according to the principal sum, as far as the money would extend; the securities to be delivered up: but the money to be given and received in no other manner than as voluntary bounty. The fund, being more than sufficient, is liable to interest of bonds to the extent of the penalties. *Aston v. Gregory*, Vol. VI. 151.

8. Purchaser taking possession before conveyance executed, held liable to pay interest. The act of taking possession generally amounts to a waiver even of objections to title, and is an implied agreement to pay interest. *Fludyer v. Cocker*, Vol. XII. 25.

9. Although a party cannot contract, *a priori*, for more than five per cent. interest, it may be agreed to settle accounts every six months, and to forbear six months upon those terms; but this cannot be applied to the case of a real security. *Ex parte Bevan*, Vol. IX. 223.

10. Interest in the West Indies six per cent. *Chambers v. Goldwin*, Vol. IX. 267.

11. Apportionment of interest on a

bond directed as accruing *de die in diem*. *Banner v. Lowe*, Vol. XIII. 135.

12. Interest decreed against a steward upon circumstances of fraud, concealment, &c. *Semble*, It would not be decreed when the practice of holding balances in his hand had been sanctioned by his principal. *Lord Hardwicke v. Vernon*, Vol. XIV. 504.

13. There is no difference between the implied contract supposed to arise out of the duty of trustees, assignees, and executors, and that of an agent and receiver, and both, therefore, equally liable to interest. *Ibid.*

14. In such cases, there is generally no limitation of time as to surcharging and falsifying the accounts. *Ibid.*

15. Upon a settlement, a trust term was created for raising portions for younger children, payable at twenty-one, and interest was given for maintenance, without any qualification whatsoever, the term being to take effect from the death of the father; but the principal was not to be raised until after the death of the father and mother, the latter being provided for by an annuity: held that the children were entitled to interest from the death of the father, during minority and the mother surviving. *Lyddon v. Lyddon*, Vol. XIV. 558.

16. Under a written contract for a sum of money, payable on demand, or a day certain, interest is in equity, as at law, payable from the time of demand made, or from the fixed period of payment. *Lowndes v. Collins*, Vol. XVII. 27.

Interest at five per cent., under a contract to give promissory notes. *Ibid.*

Interest beyond the penalty of a bond upon a mortgage for the same

debt, though by a surety. *Clarke v. Lord Abingdon*, Vol. xvii. 106.

17. Interest decreed under a general reservation of faith. *Sammes v. Rickman*, Vol. ii. 36.

[B.] WHERE NOT.

1. Interest not given upon interest. *Waring v. Cunliffe*, Vol. i. 99.

2. Interest refused, because not prayed by the bill. *Weymouth v. Boyer*, Vol. i. 418.

3. When question of interest is not reserved by the decree, it cannot be given on petition. Interest not given from the confirmation of the report upon demands liquidated by it, but not bearing interest in their nature, as legacies and arrears of annuities, though both charged on land, and the annuities were not paid out of the rents and profits, because possession was taken by mortgagees, and though one of the annuities was the provision of a widow. *Creuze v. Hunter*, Vol. ii. 157.

4. In the case of a mortgage, the whole sum liquidated by the report carries interest. *Ibid.* 159.

5. Under a judgment at law, no interest subsequent to the judgment can be recovered; but a fresh action for it may be brought. *Ibid.*

Upon farther directions, the Court may add to the decree; and therefore may give interest though that question not reserved. *Ibid.*

6. Interest is computed by the Master's report, upon such debts only as carry interest, according to the rate they carry; and, upon farther directions, subsequent interest is directed only on those upon which the report has already computed it: but no interest is computed on simple contract debts by the report, or order afterwards. *Ibid.* 165.

7. No interest is allowed upon a judgment in an account before the Master, or in an action upon it.

Disallowed upon a bill by executors to have the assets administered, upon a judgment on assets *quando acciderint*. *Deschamps v. Vanneck*, Vol. ii. 716.

8. No interest beyond the penalty of a bond, except under special circumstances. *Clark v. Seton*, Vol. vi. 411.

9. Interest not carried back farther than the time of filing the bill, upon the ground of acquiescence. *Beaumont v. Boulbee*, Vol. xi. 358.

And see AGENT [C.] 7.—AWARD, 4.

INVENTORY.

See DEVISE, 78.

ISSUE.

And see DEEDS [B.] 6.—DEVISE, 2.

1. Under a legacy to the issue of A., all descendants are entitled, and take *per capita* as joint tenants. *Davenport v. Hanbury*, Vol. iii. 257.

2. Grandchildren entitled under a bequest to issue. *Freeman v. Parsley*, Vol. iii. 421.

3. Settlement upon a second marriage (there being children of the first) of personal estate to such persons as settler should, by deed or will, appoint, and in default thereof to his issue, held not to be appointed by a will previous to such settlement; and that the word "issue," unconfin'd by any indication of intention, includes all descendants. Grandchildren therefore entitled; and the distribution to be *per capita*. *Leigh v. Norbury*, Vol. xiii. 340.

4. Bequest to two natural sons, with benefit of survivorship, upon the death of either under twenty-one, and limitations over in the event of

both dying without issue, with direction, that the surplus interest beyond maintenance should accumulate for their benefit; and the event was, that both died under twenty-one without issue: held that the intention of the testator being clear, referring only to both dying under twenty-one without issue, when they were to take absolute interest, the limitations were good as to the principal; but that the accumulation of interest belonged to the personal representative of the survivor. *Kirkpatrick v. Kilpatrick*, Vol. XIII. 476.

5. Courts endeavour to support limitations of personal property of this description; but when intended to take effect after an indefinite failure of issue, they are too remote. *Ibid.* 484.

So a limitation of furniture to *A.*, tenant in tail male, of certain mansions and estate; and if *A.* died without such issue, over to *B.*, the next in succession if living; if not, *C.* and *D.*, in succession of age, to enjoy with such mansion, &c.: held not too remote. *Southey v. Lord Somerville*, Vol. XIII. 489.

ISSUES.

See PRACTICE [M.]

JAMAICA.

And see JUDGMENT, 1.—LEGACY [N.] 11. 17.—WILL [A.]

Effect of the statute of limitations, or possessory law of Jamaica (beyond the statutes of limitations in this country), barring not merely the legal remedy, but any suit, claim, or demand, converting seven years possession into a positive absolute title.

No exception in favour of ab-

JOINT TENANT.

sentees, not being within the exception expressed; as there was no such exception out of the statutes of limitation in this country, until expressly given by statute 4 Ann. c. 16. §. 19.

The exception in the law of Jamaica relating to trustees, means actual, not constructive trusts.

The exception as to tenants for life not applicable, when they could convey the fee under a power of sale. *Beckford v. Wade*, Vol. XVII. 87.

Though the courts of justice were shut up in time of war, so that no original could be sued out, the statute of limitation continues to run.

Effect of length of time in equity, by analogy to the statute of limitations, though not directly affecting trusts.

Though no time bars a direct trust, as between *cestui que trust* and trustee, a constructive trust, barred by acquiescence, though the true state of the fact may be easily ascertained, and the ground of original relief was clear, and even arising out of fraud. *Ibid.* 97.

Redemption barred by twenty years' possession without impediment to the mortgagor, or ten years after impediment removed. *Ibid.* 99.

JOINT TENANT.

1. A joint creditor, by simple contract, may go against the assets of a deceased partner; but cannot, before the account, retain separate property of that partner in his possession. *Stephenson v. Chiswell*, Vol. III. 566.

2. Covenant by joint tenant to sell, severs the joint tenancy in equity, though not at law. *Brown v. Raindle*, Vol. III. 257.

3. Notwithstanding the leaning, of late, to a tenancy in common, an

interest given to two or more, either by way of legacy or otherwise, is joint, unless there are words of severance, as, "equally among," &c., or an inference of that sort arises in equity, from the nature of the transaction, as in partnerships, a joint mortgage, &c. *Morley v. Bird*, Vol. 111. 628.

4. Bequest to two without words of severance; they take jointly. *Stuart v. Bruce*, Vol. 111. 632.

5. Survivorship by words in a will creating a joint interest, the intention of severance not being sufficiently clear. *Whitmore v. Trezany*, Vol. vi. 129.

6. When the words of severance were confined to the subsequent limitations, held that the previous estate was a joint tenancy for life, with several remainders. *Folkes v. Western*, Vol. ix. 461.

7. To show a severance, it is not necessary to show a specific act of division; it is sufficient if there has been a general dealing, manifesting an intention to divide the whole. *Ibid.*

8. Devise and bequest of leasehold, freehold, and copyhold estates to trustees, their heirs, executors, &c., upon trust to sell, and pay debts, &c.; and after payment thereof, to pay and apply the rents, &c. to *A.* for life; and after his decease, devising and bequeathing to the heir or heirs at law of *B.*, and the heirs, executors, &c. of such heir or heirs; to whom the trustees were directed to convey and assign accordingly.

Co-heiresses of *B.* being also the co-heiresses of the deviser, take, not as co-parceners, by descent, but as joint tenants, by purchase; and therefore subject to survivorship. *Swaine v. Burton*, Vol. xv. 365.

9. Joint tenancy under a bequest of personal property to more than

one, without words of severance, *Ibid.* 371.

10. A joint purchase by two, to them and their heirs, with equal payments, a joint tenancy; and therefore survivorship. *Aveling v. Knipe*, Vol. xix. 441.

11. Under a bequest over, after an interest for life, by words importing both a joint interest and a tenancy in common, as to three "or the survivor share and share alike," the period to which the survivorship relates, depends not on any technical words, but on the apparent intention, collected from the particular disposition or the general context. *Newton v. Ayscough*, Vol. xix. 534.

And see PARTNERS, 3.—WILL, [B.] 47.

JOINTURE.

See BARON and FEME [F.] 3.

JUDGMENT.

And see INTEREST [B.] 7.—PRACTICE [M.]

1. Creditor, by judgment in Jamaica, filing bill here for satisfaction from rents and profits remitted and to be remitted, must shew his judgment to differ from judgment here, so that he cannot affect the land. *Cathcart v. Lewis*, Vol. i. 463.

2. No equity for judgment creditor, because there are prior judgments. *Ibid.* 464.

3. A judgment may be vacated, while in paper; but not, when made a record. *Pickett v. Loggon*, Vol. v. 705.

4. A decree for payment is equivalent to a judgment; but such direction for an account, and a payment according to the result of that account, is not a decree to prevent

formation or plaintiffs, they are subject to control by order personally affecting them but not the defendants. *Att. Gen. v. Cleaver*, Vol. XIX. 220.

26. Distinction between legal and equitable jurisdiction upon fraud; which at law must be proved, not presumed; and equitable jurisdiction may be exercised upon an instrument unduly obtained, where a court of law could not enter into the question. *Fullagar v. Clark*, Vol. XIX. 483.

27. Extension of legal jurisdiction to subjects formerly not dealt with at law, marriage-brocage for instance. *Ibid.* 483.

28. Equitable jurisdiction to order a deed, forming a cloud upon a title, to be delivered up, though void at law. Accordingly a demurrer to a bill to have deed fraudulent and void, as in contemplation of bankruptcy, delivered up was overruled. *Hayward v. Dimsdale*, Vol. XVII. 111.

29. Distinction between directing an instrument to be delivered up and making it effectual in equity. *Macleod v. Drummond*, Vol. XVII. 167.

30. Commissioners under an inclosing act liable to suits at law, and in equity, for acts not according to their authority. Demurrer to a bill upon that principle, charging, not collusion expressly, but that they were proceeding to divide unjustly, and not according to their authority, viz. upon the information of a tenant of the plaintiff's manor, being owner of the adjoining one, and the boundaries and documents being intermixed, overruled. *Speer v. Cramter*, Vol. XVII. 216.

KIN, NEXT OF.

And see **BARON AND FEME**, [A] 12.
—**EXECUTOR**, [B.]—**POWER**, 62.

—REPRESENTATIVE, *passim*.— RESULTING TRUST.

1. Testator bequeathed 5000*l.* in trust for his daughter *A.* for life, and after her decease, for such child or children as she shall leave at her decease in such shares as she should think proper; and in case she shall die, leaving no child, then as to 1000*l.* for her executors, administrators, or assigns; and as to the remaining 4000*l.* in trust for such person or persons "as shall be my heir or heirs at law." The 4000*l.* vested in *A.* and the other two daughters of the testator being his co-heiresses at law and next of kin at his death. If that union of characters had not occurred, *Quere*, whether the next of kin could claim; and supposing the heirs intended, what description of heirs. *Holloway v. Holloway*, Vol. v. 399.

2. *Primâ facie* words must be understood in their legal sense, unless by the context or express words plainly appearing intended otherwise. *Ibid.* 401.

3. Testator, after making provision for his wife, with a clause of forfeiture, in which case the residue might be considerable after certain bequests, directed that the residue should be divided amongst his next of kin, as if he had died intestate; held that the wife was not one of the next of kin in the ordinary sense, or in that sense in which the testator used the words. *Garrick v. Lord Camden*, Vol. XIV. 372.

4. So a bequest by a wife, under a power to her next of kin, does not include her husband. *Ibid.* 382.

5. If the wife had been entitled to share in the residue she would not have lost the benefit by the forfeiture of the previous interest. Where testator expressly declares the penalty of the condition im-

posed, the Court will not enforce its performance by enlarging the forfeiture.

6. Upon a compromise decreed with the consent of the attorney-general to be carried into affect, the next of kin are bound, and their bill claiming interest on sums to be accounted for under the compromise, was dismissed. *Andrew v. Trinity Hall, Cambridge*, Vol. ix. 525.

7. Residue "to my next of kin in equal degree," nephews and nieces not entitled to share with brothers. *Wimbles v. Pitcher*, Vol. xii. 433.

8. The description "next of kin" means at the death. *Ibid.*

9. The marital right of the husband, as administrator by law, excluded by a limitation to the next of kin of the wife. *Anderson v. Dawson*, Vol. xv. 537.

10. Under a limitation in a marriage settlement of the wife's property, in default of her appointment for her next of kin or personal representative, the husband not entitled. *Barley v. Wright*, Vol. xviii. 49.

11. Whether a bequest to "next of kin," without reference to the statute of distributions, or a division, as in the case of intestacy, should not be confined to nearest of kindred, as brothers and sisters, excluding nephews and nieces, *Quere. Smith v. Campbell*, Vol. xix. 404.

12. Technical signification of the words "next of kin," with reference to the statute of distributions. *Ibid.* 404.

LACHES.

And see EXECUTOR, 16. 22.

1. Laches does not apply to a large body of creditors. *Whichcote v. Lawrence*, Vol. iii. 740.

2. Creditors not relieved in equity after gross laches, as where a credi-

tor, seven years after coming of age, filed a bill for an account, and took no step for 33 years, and then filed a bill against residuary legatees of a party whose assets were distributed with notice to plaintiff, and against other representatives, the bill was dismissed upon the laches only; though the question of satisfaction was doubtful. *Hercy v. Dinwoody*, Vol. ii. 87.

3. Residuary legatee having been admitted to a copyhold estate was in possession above 19 years; when the heir obtained possession by ejectment, after acquiescence for nine years, the residuary legatee filed a bill, claiming the estate, as having been a redeemable interest in the testator; and, having been treated as such, it was so decreed. An account was directed of the money expended in repairs, &c.; and inquiries as to incumbrances; the Court inclining strongly to support the acts of the heir, while in possession. *Hardy v. Reeves*, Vol. iv. 466.

4. Demurrer on the ground of length of time to a bill for redemption of a mortgage is good. *Ibid.* 479.

5. Bill for an account of the produce of the captures by the Royal Family privateers of Bristol dismissed on the ground of laches: the original bill having been filed in 1749; but the length of time cannot be pleaded in bar. *Pearson v. Belchier*, Vol. iv. 627.

6. Specific performance refused on the laches and trifling conduct of the plaintiff; the contract being for a sale to the plaintiff under a bankruptcy of a reversionary interest for life; which in the interval fell into possession. The defendants having also been in some degree remiss, the bill was dismissed without costs upon delivering up the agreement. *Spurrier v. Hancock*, Vol. iv. 667.

7. Bill against the devisee and

personal representatives, on the ground of an election by the testatrix to take under a will, dismissed with costs, on the conduct of the plaintiff; who eighteen years ago had compromised a suit instituted by him upon the subject; in consequence of which the right to compel an election, depending on a doubtful question on the will, was not ascertained: and the party possessed under the will during her life had disposed of her estate real and personal by will. *Yate v. Moseley*, Vol. v. 480.

8. The Court refused to vacate the enrolment of a decree dismissing the bill with costs by default: and afterwards upon a new bill for the same purpose granted a motion for time to answer till a month after payment of the costs of the other cause; adopting the practice at law. *Pickett v. Loggan*, Vol. v. 702.—See Vol. xiv. 215.

9. Right of legatee not bound by mere acquiescence under the mistaken construction of the executor. *Newton v. Ayscough*, Vol. xix. 534.

LANDLORD AND TENANT.

And see FORFEITURE, 3.—INJUNCTION, 6, *et seq.*—INTERPLEADER, 6.

1. Tenant cannot set up a title against his landlord. *Wilson v. Lord John Townshend*, Vol. II. 696.

2. Tenant covenanting to keep and leave the premises in repair must rebuild in case of fire. *Pym v. Blackburn*, Vol. III. 34.

3. Duty of the tenant to keep the boundaries; and the Court will aid the reversioner to distinguish them: and, if they cannot be distinguished, will give him as much land. *Aston v. Lord Exeter*, Vol. VI. 293.

4. Tenant may file a bill of inter-

LANDLORD AND TENANT.

pleader against his landlord, where the question arises upon the act of the landlord subsequent to the lease; and was allowed where the vicar, lessor of tithes, and his assignees under an insolvent act, both claimed the rent, but the defendant's assignees being trustees for creditors were allowed their costs as against the other defendants. *Cowan v. Williams*, Vol. ix. 107.

5. Equity may, by 4 Geo. 2. c. 28. relieve against a forfeiture by non-payment of rent, but not for breach of other covenants. *Wadman v. Calcraft*, Vol. x. 67.

6. Upon a contract for the estate and chattels, stock, &c. and permission to be in arrear of rent to the extent of 500*l.* with power to the landlord to enter by distress and bill of sale. Landlord entered accordingly, and upon bill by the tenant for injunction, order made to restore specifically, the answer not stating whether the sum, under which by the contract he was not to enforce his remedies, was really due. *Nutbrown v. Thornton*, Vol. x. 159.

7. Where a verdict was obtained against a landlord and his tenant in ejectment, and the tenant subsequently attorned to the party recovering, held that the landlord had an equity to restrain the tenant from setting up his former lease to defeat his landlord's ejectment, though the lease had only a short period to run; and it is not necessary that the ejectment should be brought before the bill actually filed. *Baker v. Mellish, &c.* Vol. x. 544.

8. In case of tenancy at will, in general, the death of either party determines the will. *James v. Dean*, Vol. XI. 391.

9. Where the tenant claimed a lease of premises on the ground of expenditure under an alleged old agreement, supported by one witness, but which was positively de-

nied by the answer, and confirmed by circumstances, Court refused to decree it, although upon the general equity the tenant might have been entitled to the benefit of the improvements made with the concurrence of the landlord, the bill not being framed for redress on that ground, but upon the alleged agreement, which totally failed. *Pilling v. Armitage*, Vol. xii. 78.

10. The Court will not relieve upon the general equity, upon the mere knowledge of the landlord, without any specific engagement. *Ibid.*

Quere, As to expenditure on another's estate through inadvertence, the party seeing it and not interfering; or a tenant expending with his landlord's knowledge, aware also that his lease is bad. *Ibid.* 85.

11. A tenant cannot make his landlord interplead with a stranger setting up a demand; but where the claim of such third person arises out of an act by the landlord subsequent to the relation of landlord and tenant, the rule does not prevail. *Clarke v. Byne*, Vol. xiii. 383.

12. Tenancy at will may be determined at any time, as to any new contract: not as to any thing, which during the tenancy remained a common interest. *Peacock v. Peacock*, Vol. xvi. 57.

13. Covenant for perpetual renewal valid. *Willan v. Willan*, Vol. xvi. 84.

14. Injunction to restrain a tenant from year to year, under notice to quit, as in the case of a lessee for a longer term, from doing damage, and from removing the crops, manure, &c. except according to the custom of the country. *Onslow v. —*, Vol. xvi. 173.

15. Tenancy at will determined by an agreement to purchase. *Daniels v. Davison*, Vol. xvi. 252.

16. Tenancy from year to year favoured. *Ibid.*

17. As to relief against an ejectment by a landlord for breach of a covenant to repair, *Quere. Hill v. Barclay*, Vol. xvi. 402.

18. Relief against a right of entry on breach of covenant by non-payment of rent. *Ibid.*

19. Obligation of tenant to take care of the rights of his landlord. *Speer v. Crawley*, Vol. xvii. 225.

LAND TAX.

And see LUNATIC, 52.—TENANCY FOR LIFE.

Upon bill filed by an annuitant on the New River Company, claiming a reduction of his assessment to the land tax, on the ground, that the company did not pay the full assessment on their full profits, but of a much less sum, the Court refused to raise the equities between one party who had paid no more than he ought, and those who had paid less than they ought. *Adair v. New River Company*, Vol. xi. 429.

LEASES.

And see AGENT AND PRINCIPAL [D.]

4.—ASSETS, 1.—CHARITY, 39. 59.

61. 79, 80. 84. 86.—COVENANT, *passim*.—ESTATE FOR YEARS.—

FRAUDS, STAT. OF, 1. 3.—LANDLORD AND TENANT, *passim*.—

POWER, 83.—PLEDGE.—RENEWAL, *passim*.—SPECIFIC PERFORMANCE.

1. Where there is a demise, lessor cannot bring an action for use and occupation, as a stranger may: but it must be upon the deed for the rent. *Dungay v. Angove*, Vol. ii. 307.

2. Whether a lease for seven,

fourteen, or twenty-one years is determinable at either of the intervening periods, at the option of both parties, or of the lessee only, nothing being expressed as to that, *Quære*. *Dann v. Spurrer*, Vol. VII. 231.

3. The relief in respect of expenditure, under an erroneous opinion of title, or an expectation of a larger interest, or that the enjoyment would not be disturbed, with the knowledge and permission of the other party, requires a case of bad faith clearly made out. In this instance it failed for want of evidence. *Ibid*. 231.

4. The true principle of the statutes, enabling and disabling, as to leases, seems to be, that the intention, with reference to which the act and the expressions contained in it are used, must be considered. *Griffiths v. Vere*, Vol. IX. 135.

5. Upon a covenant in a lease of twenty-one years, at the expiration of eighteen years to execute a new lease, "with all covenants, grants, and articles," as in the said lease contained, and bill for specific performance, Court held that it was not a case for decreeing a perpetual renewal, without being satisfied by a court of law of the legal meaning of the contract, retained the bill for twelve months, with liberty to bring an action. *Iggulden v. May*, Vol. IX. 325.

The construction of such a covenant is the same at equity as at law, and not to be affected by the acts of the parties. *Ibid*.

6. Upon a demise by a copyholder for a year, and at the end of that term from year to year for thirteen years, if the lord, &c. will give licence, and so as there shall be no forfeitures, with other usual covenants in a farm lease, the court of law held, that no licence having

been obtained, there was no lease, except from year to year, and ejectment would lie before the expiration of the fourteen years of such premises; and that the tenant being evicted, he could not maintain any action on the covenant for quiet enjoyment. Chancellor held that the tenant having no right, there was no equity to sustain a bill. *Luffkin v. Nunn*, Vol. XI. 170.

7. *Quære*, Whether, without express stipulation in the contract, a person in possession, under a contract with a lessee, can require the production of the lessor's title; or if the lessee can compel upon such production? *White v. Foljambe*, Vol. XI. 337.

To make good the title to the residue of an old term, mesne assignments which could not be produced; would be presumed, even at law. *Ibid*. 350.

Semblè, An incumbrance cannot be represented as too old to be attended to, unless it can be presumed not to exist. *Ibid*.

8. Upon an agreement with A. and his assigns for a lease, with a proviso against assigning the lease without licence, A. becoming bankrupt before lease executed, held that an individual could not have a specific performance of the agreement. *Quære*, If the assignees could have it for the benefit of general creditors. *Weatherall v. Geering*, Vol. XII. 504.

9. A lessee restrained from assigning without licence, can only have assigns of two sorts; an assign approved by the landlord by appointment, and designation of law. *Ibid*. 513.

10. Where an act of Parliament empowered the archbishop of C. and the lessee of an existing lease, his assigns, &c. to grant building leases, and it appeared that the

lessee surrendered such lease, and took a renewed one, and granted out such building leases, held that he was not an assign, &c. within the act, and that the leases so granted out by him were not authorised, and therefore invalid. *Collett v. Hooper*, Vol. XIII. 255.

The Court could not supply an omission in the act, from its knowledge of the usage to renew church leases. *Ibid.*

11. A renewed lease may be considered as the original lease, for the purpose of protecting interests carved out of it. *Ibid.* 260.

12. Upon a proviso not to assign without licence, held that the condition was gone after assignment, with licence once granted, though to a particular individual. *Brumwell v. Macpherson*, Vol. XIV. 173.

13. Under an agreement for a lease the lessor is not without express stipulation entitled to a covenant, restraining alienation without licence; as a proper and usual covenant. *Church v. Brown*, Vol. xv. 258.

14. Power of assignment incident to the estate of a lessee, without the word "assigns," unless expressly restrained. *Ibid.* 264.

15. Execution of an agreement for a lease, with proper covenants; viz. according to the general practice as to such leases; and not contradicting the incidents of the lessee's estate; one of which is the right to have it without restraint, except what is imposed by law; unless an express contract for more. *Ibid.* 264.

16. Covenant, restraining assignment of a lease, would not permit under-letting. *Ibid.* 265.

17. Covenants, restraining lessee from alienation without licence, construed with jealousy. *Ibid.*

18. Proper covenants implied in

an agreement for a lease; as connected with the character and title of the lessor. *Ibid.*

19. Covenant, that a lease shall determine upon the bankruptcy of the tenant. *Ibid.* 268.

20. Under an agreement for a lease, "with usual covenants," the lessor is not entitled to a covenant against assigning or under-letting without licence. *Brown v. Raban*, Vol. xv. 528.

21. Bequest of leasehold premises, "and all my estate, term, and interest therein," the interest acquired under a subsequent renewal of the lease, does not pass. *Slatter v. Norton*, Vol. xvi. 197.

22. Distinction between bequests of leasehold estate by words in the present and in the future tense, as confined to the existing, or comprehending a future interest. *Ibid.* 199.

23. An agreement for a lease for seven, fourteen, or twenty-one years, gives the option to the lessee alone. *Price v. Dyer*, Vol. xvii. 363.

24. Tenant, having committed breaches of covenant by waste, treating the land in an unhusband-like manner, &c. not entitled to specific performance of an agreement for a lease. *Hill v. Barclay*, Vol. xviii. 63.

25. No equity in favour of a lessee of a house, liable to repair with the exception of damage by fire, for an injunction against an action under the contrary for payment of rent upon the destruction of the house by fire. *Hollzapffel v. Baker*, Vol. xviii. 115.

26. Covenant to repair, and at the end of the term surrender buildings in good condition, does not preclude an injunction against pulling them down, and carrying away the materials, just before the end of the term. *The Mayor, &c. of London, v. Hedger*, Vol. xviii. 355.

LEGACY.

- [A.] ABSOLUTE.
- [B.] CONDITIONAL.
- [C.] CONTINGENT.
- [D.] SPECIFIC.
- [E.] ACCUMULATION.
- [F.] SURVIVORSHIP.
- [G.] LAPSE.
- [H.] REDEMPTION.
- [I.] SATISFACTION.
- [K.] VESTING.

[A.] ABSOLUTE.

1. Bequest to *A.* and in case of her death to *B.* held an absolute interest in *A.* *Hinchley v. Simmons*, Vol. iv. 160.

2. Legacy to *A.* or in case of his death to his issue, absolute in the parent. *Turner v. Moor*, Vol. vi. 557.

3. *A.* tenant for life, in case she should so long continue unmarried; in case of her marriage to her in fee; in case of her decease unmarried, to her sister *B.* in fee. *A.* and *B.* and the husband of *B.* joined in a sale. The purchase money was laid out in the funds, in the names of trustees, without any declaration of trust or agreement as to the application; nor was any notice of this fund taken in the wills of *B.* and her husband, and *I.* being the survivor, made a general disposition of all her personal estate in favour of *A.*, though still unmarried, held absolutely entitled to the stock. *Scawen v. Blunt*, Vol. vii. 294.

4. The effect of a positive bequest not to be controlled by inference and argument from other parts of the will. *Cambridge v. Rous*, Vol. viii. 42.

5. Of stock in trust for the use, exclusive right, and property of *A.* but should she happen to die, then in that case among her children:

LEGACY.

another legacy of stock to *A.* to be paid her as soon as possible, or in the event of her death among her children: another legacy of stock to *B.* and in case of her death among her children: all these legacies held absolute in the respective mothers. *Webster v. Hale*, Vol. viii. 410.

6. Bequest to the testator's widow of an annuity of 60*l.* "and the sum of 300*l.* to be disposed of as she thinks proper, to be paid after her death," held to give an absolute interest in the 300*l.* and transmissible to her administrator, and not to be a mere power of appointment; power, being a restraint of property never to be implied, and to be construed strictly. *Hixon v. Oliver*, Vol. xiii. 108.

7. Time where annexed not to the legacy itself, but only to the payment, interest is vested. 113.

8. A bequest to a natural son in its terms absolute and unqualified, afterwards a power was given to the executors in their discretion to invest it in government securities and pay the interest to him for life; one of the executors being dead in the life time of the testator, and the others having renounced probate, and the power unexecuted, held that the interest in the legacy remained absolute. *Keates v. Burton*, Vol. xiv. 434.

9. Devise and bequest of real and personal estate in trust to pay the rents, dividends, &c. to the separate use of a married woman for life, and after her decease to convey, &c.; with a limitation over, in case of her death in the life of the testatrix, or in default of appointment, absolute property; notwithstanding the indication of an intention, that the estate should be in the trustee for her life, with powers inconsistent in a great degree with the supposition of her having, or being able to acquire the

absolute interest. *Barford v. Street*, Vol. xvi. 235.

[B.] CONDITIONAL.

And see CONDITION.

1. The testator bequeathed a legacy to his daughter, to be paid within twelve months after his decease; but if she should marry *A.*, then he revoked the legacy. She remained unmarried till about fourteen months after the testator's death; and then married *A.* They obtained a decree for the legacy. *Osborn v. Brown*, Vol. v. 527.

2. Words of condition are unfrequently construed to designate only the time at which the interest should take effect in possession; though standing by themselves they would operate as words of condition. *Lane v. Goudge*, Vol. ix. 230.

3. Legacy on condition to be void in case the legatee should succeed in the event of the death of *A.* without issue of her body: payment decreed in the life of *A.* and without security. *Fawkes v. Gray*, Vol. xviii. 131.

4. Testatrix gave nine legacies of 1000*l.* each, part of 14,500*l.* South Sea annuities; and as to the residue of the said fund, and all other her personal estate, including such of the said legacies as should lapse by death, before they should be transferable upon trust, to convert into money such part of her residuary personal estate as shall not consist of South Sea annuities, and invest such money, with any money belonging to her at her decease, in said fund of South Sea annuities, and from time to time invest the dividends, &c. of all such South Sea annuities as shall constitute her residuary personal estate in the same fund, till the youngest of said legatees shall, or would, if living, have attained twenty-one, and then to

transfer the whole of such South Sea annuities to said nine legatees equally, with such survivorship as their original shares. The nine legacies of 1000*l.* each, only are specific; the remainder of the South Sea annuities is part of the general personal estate. *Richardson v. Brown*, Vol. iv. 177.

[C.] CONTINGENT.

1. Legacy payable at twenty-one with proviso to go over if legatee should at any time become seised of the real estate to which he was intitled in remainder after an estate tail limited upon an estate for life subsisting when he became twenty-one. Court cannot then keep back the money from him to await the event, but it may be disputed afterwards upon the happening of the contingency. *Griffiths v. Smith*, Vol. i. 97.

2. Legacy in trust to pay out of the interest 60*l.* a year to the testator's wife for life, and the remaining interest during her life to *R. Duke of M.* and in case of his death to his eldest or only son; and for want of issue male to his eldest or only daughter; for want of such issue female to sink into the residue; and after the death of his wife the testator gave the principal to the said duke, if then living; but if then dead, to his eldest or only issue male then living; and for want of such issue male to his eldest or only daughter; for want of such issue female to sink into the residue. *R. Duke of M.* died leaving two sons and a daughter: both the sons died; the eldest left a son, *Duke of M.*, who filed the bill. The plaintiff is entitled to the surplus interest: but the principal is contingent till the death of the testator's widow. *Duke of Manchester v. Bonham*, Vol. iii. 61.

3. Contingent legacy out of real and personal estate payable two years after the event; by codicil the testator reciting, that he found his estate would not bear that payment during the life of *A.* being chargeable with an annuity for her life, declared, he revoked that part of his will: and that the said legacy upon the same event was to be paid twelve months next after the death of *A.* and not before. *A.* dying before the contingent event, the legacy is not payable till the expiration of the two years after it. *Wordsworth v. Younger*, Vol. III. 73.

4. Legacy to *A.* if he be living, and in case of his death before *B.* to *C.* is contingent, viz. if *A.* survives *B.* *Hodges v. Peacock*, Vol. III. 735.

5. A legacy upon an express contingency, which never happened, failed, notwithstanding the apparent intention in favour of the legatee. *Holmes v. Cradock*, Vol. III. 317.

6. Bequest to *A.* for life, and after her decease to *B.* and *C.* in equal moieties; and in case of the decease of either in the life of *A.* the whole to the survivor of them living at her decease. *B.* and *C.* have vested interests as tenants in common, subject to be divested only upon the contingency expressed. *Harrison v. Foreman*, Vol. v. 207.

7. A contingent legacy failed: the event, which happened, not being provided for; and no necessary implication in favour of the legatee. *Parsons v. Parsons*, Vol. v. 578.

8. A codicil expressed in the event of the testator's death, before he joins his wife, was executed after their separation in the West Indies upon his voyage for England. That voyage being prevented by accident, he joined her: they lived together there and in England, having returned together; and the testator having afterwards gone to Corsica,

and thence to Lisbon, died there. The codicil was held to be contingent, and did not take effect under the circumstances. *Sinclair v. Hone* Vol. VI. 607.

9. Bequest to the testator's wife, if living at his decease, provided she continued his widow; but if she should die before his decease, or afterwards marry again, then and in either of such cases to his father "if he shall be living at the time of my decease, or of such marriage as aforesaid, and in case he shall not be then living, I give and bequeath the same to my brother." The father survived the testator, but died before the marriage of the widow. Upon her marriage the brother entitled. *Pyle v. Price*, Vol. VI. 779.

10. Construction of a residuary clause, as comprehending a legacy given upon a contingency which did not happen. *Bird v. Le Fare*, Vol. xv. 589.

[D.] SPECIFIC.

1. Legacies to be paid out of a specific security, which failed, held general upon the circumstances. *Roberts v. Pocock*, Vol. IV. 150.

2. Legacy of stock to *A.* to be laid out in annuity for her life; *A.* died two days after the testator, and before any alteration in the stock: her administrator entitled to a transfer. *Barnes v. Rowley*, Vol. III. 305.

3. Legacies declared specific upon clear words, and an abatement of the general legacies directed. *Barton v. Cooke*, Vol. v. 461.

4. Bequest of an annuity of 200*l.* for the use of *A.* and her children, to be paid out of the general effects until it is convenient to the executors to invest 5000*l.* in the funds in lieu thereof for her and their use, and to the longest liver, subject to an equal division of the interest, while more than one alive: held an

uity, not an absolute legacy. *s v. Mitchell*, Vol. VI. 464.

Bequest of the debt, which shall wing on a particular day, taken stood on that day; and not af- d by consignments from the t Indies on account since the h of the testator, which hap- d previous to the day specified. . 461.

Distinction as to real and per- l estate. Every gift of land, a general residuary devise, is ific; and that only, to which party is entitled at the time, can : in the case of personal pro- y what he has at his death will ; and if the description is spe- it may operate as a direction to phase. *Nannock v. Horton*, Vol. 399.

Leaning against specific lega- . Unless specific, interest only r the end of a year after the tes- r's death, notwithstanding a di- on to pay as soon as possible. *ster v. Hale*, Vol. VIII. 410.

. Specific bequest of stock to the utrix for life, and after her death er daughter absolutely at twenty- . The Bank, resisting a transfer, rding to an agreement to re- uish the life interest, without direction of the Court, are en- d to costs. *Austin v. The Bank ngland*, Vol. VIII. 522.

. Bequest of "200*l.* 4 per cent. s. bank annuities," not specific the general assets liable to make the deficiency of the fund, costs reed out of the residue, being lered necessary, either by the duct of the executrix, also re- ary legatee, or of the testatrix. *son v. Brownsmith*, Vol. IX. 180.

). Where the legacy to a younger d was "the sum of 12,000*l.* of funded property to be transferred his name, or employed as shall ear most beneficial," and similar

legacies to other younger children, to be enjoyed in every respect the same, and the residue, real and per- sonal, was given to the eldest son; held that the children were entitled to the worth of 12,000*l.* each out of this property, if sufficient; and if not, to have it equally divided among them. *Lambert v. Lambert*, Vol. XI. 607.

11. Legacy of 5000*l.* sterling, or 50,000 current rupees, afterwards described "as now vested" in the East India Company's bonds, and sometimes mentioned "as the said sum of 5000*l.* sterling;" held not specific, but general, as a demon- strative legacy, with a fund pointed out; a construction to be favoured for a natural child, as giving a pro- vision in all events; the will also giving one legacy clearly specific; viz. the sum of 3348*l.* "which said sum is in two bills," described as then lying for acceptance. *Gil- laume v. Adderley*, Vol. xv. 334.

12. Devise in trust to sell, but not for less than 10,000*l.* and to pay several sums, amounting to 7800*l.* and the overplus monies arising from the sale to A. A specific legacy of 10,000*l.* and the sale producing less, A. and the others to abate; legacies to charity void by the stat. 9 Geo. 2. c. 36. fell into general residue. *Page v. Leapingwell*, Vol. XVIII. 463.

13. Construction of a bequest of furniture, plate excepted, is a spe- cific disposition without notice of plate. *Langham v. Sanford*, Vol. XIX. 644.

14. Specific legacy not liable to contribute to pecuniary legacies. *Ibid.* 645.

15. Legacy of the money due upon a note held specific, upon the in- tention: but the inclination of the Court is against specific legacies, and to hold it a general legacy, with reference only to the security, as

the fund first to be applied to it. *Chaworth v. Beech*, Vol. iv. 555.

16. Specific legacy retained by the executor for assets; but was not wanted: in case of depreciation the legatee is entitled to the original value. *Ibid.* 555.

17. Testator gave to his sister the interest of 300*l.* upon bond for life, and after her decease to her daughter the interest due upon the said bond at her death, with the principal. The legacy is specific; and there being among other bonds one of the exact amount, it was held to refer to that, though an insolvent security, and the interest in arrear before the death of the testator. *Innes v. Johnson*, Vol. iv. 568.

18. The inclination of the Court is against specific legacies. The construction must be upon the face of the will, before the account of the effects is considered, to see whether that affords a foundation. *Ibid.* 568.

19. Legacy of "1000*l.* out of my reduced bank annuities" held pecuniary: the Court leaning against holding a legacy specific, unless clearly intended. The Court would not take into consideration the evidence of the value of the stock at the date of the codicil, by which the legacy was given, nor an erasure of a legacy to the same person by the will; but decided upon the words of the codicil. *Kirby v. Potter*, Vol. iv. 748.

20. "Of my stock," or "in my stock," or "part of my stock," will make a legacy specific. *Ibid.* 750.

21. A specific legacy vests immediately from the death of the testator. *Ibid.* 751.

[E.] ACCUMULATIVE.

1. Legacies nearly similar to same persons by different instruments, legatees not entitled to both. *Moggridge v. Thackwell*, Vol. i. 464.

Such legacies generally presumed additional, unless contrary intention appears: of which simple repetition if exact, is sufficient proof. *Ibid.* 472.

So, not adeemed by a second instrument not relating to the first.

2. The rule, that legacies to the same persons by different instruments shall be accumulative, repelled by internal evidence of intended substitution. *Allen v. Calow*, Vol. iii. 289.

3. The rule that legacies to the same persons by different instruments shall be accumulative repelled by internal evidence, and the circumstance that all the legatees by the first instrument were legatees in the second, except those who were dead, or had quitted the testator's service. *Barclay v. Wainwright*, Vol. iii. 462.

4. Legacy by will: the same sum given by codicil to the same person upon a contingency was held additional. *Hodges v. Peacock*, Vol. iii. 735.

5. A claim of double legacies by two instruments, a will and a codicil, repelled by the internal evidence and circumstances. *Osborne v. the Duke of Leeds*, Vol. v. 369.

6. Whether parol evidence of the intention of the testator can be read originally in opposition to a claim of double legacies, *Quere. Ibid.*

7. Double legacies by two instruments upon the intention. *Ibid.*

8. Small circumstances will raise an inference against double legacies. *Ibid.* 384.

9. Specific disposition by will, subject to annuities and legacies, held auxiliary only; general personal estate to be applied in the first instance. *Ibid.*

10. Two annuities of the same amount to the same person, held not accumulative. *Ibid.*

11. Where a father by will bequeathed his daughter 1000*l.* to be paid on the day of her marriage with consent, &c.; and on her marriage in his lifetime he gave her 500*l.* declaring it not to be a satisfaction of the legacy: held, that it was a substantive gift, and that no intention of satisfaction being expressed, but the contrary, she was entitled to both. In case of parent and child a presumption is raised against a double portion, but declarations may be weighed. *Robinson v. Whitley*, Vol. ix. 577.

12. As where the same sum is given for the same cause, whether by the mere equality of amount, *Quære*. *Benyon v. Benyon*, Vol. xvii. 34.

13. Right of pecuniary or residuary legatee to follow the assets in case of misapplication, where a creditor or specific legatee could. *M'Leod v. Drummond*, Vol. xvii. 169.

Lien of residuary legatee on the specific fund. *Ibid.* 169.

Legacies to the same persons by distinct instruments, accumulative: subject to be repelled by internal evidence. *Ibid.*

14. Double legacies, though of equal amount, with circumstances of difference, as in the times of payment of annuities, half-yearly and quarterly, accumulative: not if exactly similar, though by different instruments. *Currie v. Pye*, Vol. xvii. 462.

15. Devise in trust to pay several persons 1000*l.* each: on the death of any, in case of a deficiency, the others abate; but if to pay debts and legacies, and one legatee dies, the trust is for the other legatees, if necessary. *Ibid.* 466.
And see ELECTION, 3.

[F.] SURVIVORSHIP.

And see BARON AND FEME, [E.]

1. Bequest to be equally divided share and share alike: they take in common; and no survivorship. *Bolger v. Mackell*, Vol. v. 509.

2. A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse; and did not prevent the legacies vesting. *King v. Taylor*, Vol. v. 806.

3. Bequest to all the children of testator who should be living at his decease, with survivorship: held, that such children who died during his life took nothing that could lapse, descend to issue, or survive to the other children. Court cannot, in the construction of a will, act upon any ground of mistake in framing it. *Shergold v. Boone*, Vol. xiii. 370.

[G.] LAPSE.

1. Residuary legatee dying in the lifetime of testator, executors are trustees of such residue for the next of kin, although no legacy be given to them except for mourning. *Bennett v. Bachelor*, Vol. i. 63.

2. Bequest of "all other unbequeathed goods and chattels" is residuary, notwithstanding a subsequent bequest to the same person of debts due to the testator. *Ibid.*

3. No difference between a lapse and what is not disposed of, except in construing intention. *Ibid.*

4. Trust legacy cannot lapse by death of trustee. *Moggridge v. Thackwell*, Vol. i. 475.

5. Legacy charged upon real estate, and payable at a future day, sinks as to the real estate by the death of the legatee before the time of payment; and the assets cannot be marshalled. *Pearce v. Loman*, Vol. iii. 135.

6. Testator gave his sister M. and his brother W. the interest of the residue equally; at the death of

M: one half of the principal to her children; her husband by no means to have any part, but to be entirely for the children; if none, to W.'s children; and after the death of W. and his wife, the other half to his children; and he excluded his eldest brother from any benefit: M.'s life interest is not to her separate use; the interest of the other moiety during the lives of W. and his wife would have vested in W. and therefore lapsed by his death in the life of the testator. *Brown v. Clarke*, Vol. III. 166.

7. Legacy to A. in case she shall be living with the testatrix at her decease, with limitations over upon the death of A. before twenty-one or marriage, fails by the death of A. in the life of the testatrix. *Allen v. Callow*, Vol. III. 294.

8. So, the amount of the property, the piety or prudence of the disposition afford no fair ground for controlling it. *Thellusson v. Woodford*, Vol. IV. 340.

9. Where the whole is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property. *Ibid.* 408.

10. To prevent a lapse the intention must be clear. *Ibid.* 435.

11. If an estate be devised charged with legacies which fail, devisee, and not heir, shall have the benefit of it. *Kennell v. Abbott*, Vol. IV. 811.

12. An annuity given to A. B. and C. and their heirs, equally to be divided among them, *in the order they are now mentioned*, out of funds partly temporary, partly perpetual, held to be a perpetual annuity, with an absolute power of disposition; and that the words *in the order, &c.* must be rejected as insensible and repugnant; and that by the death of A. in the lifetime of testatrix, the

legacy lapsed; the extension of *to the heirs did not give it continuance, or prevent it lapsing.* *Smith v. Pybus*, Vol. IX. 566.

13. Distinction between a residuary devisee and legatee as to lapse; the latter taking every thing that lapses, the former not. *Dawson v. Clark*, Vol. XV. 415.

14. By the law of Scotland, as well as of England, a legacy lapses by the death of the legatee in the testator's life. *Rose v. Rose*, Vol. XVII. 351.

And see **BARON AND FEME**, [B.] 10.

[H.] ADEMPTION.

And see **tit. SATISFACTION**, 28, and *supra*, [E.] 1.

1. Marriage portion held a satisfaction of a legacy to the same amount from a father, there being no evidence to repel the presumption. Being a presumption of law, it cannot be tried by a jury: it may be rebutted by evidence of intent, that the legacy shall be a subsisting benefit. *Ellison v. Cookson*, Vol. I. 100.

2. Testator gave the interest of a bill of exchange on the East India Company to his wife for life, and directed, that after her death the bill should be sold, and the money divided among certain persons with survivorship in case of the death of any in her life. This bill, which constituted the bulk of testator's property, was paid in his life: that was not an ademption of the legacy. *Coleman v. Coleman*, Vol. II. 639.

3. The Master of the Rolls was of opinion, that upon the bequest of a debt there is no distinction between a voluntary and compulsory payment to the testator as to the question of ademption. *Chaworth v. Beech*, Vol. IV. 574.

4. Specific legacy of money due

note, which testatrix afterwards red in her lifetime, and placed a banker with whom she had her account, but afterwards out a small part, held to be lemp tion. *Fryer v. Morris*, x. 360.

[I.] SATISFACTION.

nd see tit. SATISFACTION.

On deficiency of assets mar-portion no satisfaction of a y to the wife from her father; or tion being less than the le- and having been paid abso- to the husband upon giving certain interest of his wife; gacy being to the wife for remainder to her children and children, remainder over; and expressly in satisfaction of or distinct interest of the wife: emption, the intent not being ently plain. *Baugh v. Read*, . 257.

Agreement between mother, : in fee and in tail, and her hat she would convey to him ate in fee, and that he should, in possession of the estate tail death, pay his sister 20,000*l*. her fortune and portion;" the nent was never executed, but other afterwards made a ge- devise in favour of her son, ed with a legacy of 20,000*l*. daughter, "for her portion, e, and advancement:" the a satisfaction of her interest the agreement, *Finch v. Finch*, . 534.

To raise a question of satis- 1 or election the intent must ar: if it is, devisee cannot nder the will, and also in op- to it, even his own property. ed by testator to go otherwise. 35.

[K.] VESTING.

1. Legacy to A. for life, and to her children at her decease, vests in all the children as they come *in esse*; but upon the circumstances of this case, it vested in those living at the death of the mother only. *Spencer v. Bullock*, Vol. II. 687.

2. Legacy by a grandfather in trust for the five children by name, and all and every the child and children of his son equally at 21, or upon the marriage of the daughters, with power to advance money for putting out all and every, or any of the sons to business; the first attaining 21, is entitled to receive his share then. *Prescott v. Long*, Vol. II. 690.

3. Legacy to be paid at a particular time is *debitum in presenti solvendum in futuro* and vested. *Crickett v. Dolby*, Vol. III. 13.

4. Testator gave the interest and produce of the residue to his two sisters for their lives; and after their decease the principal to be paid to their children, share and share alike; but whichever died before the other, then the share so paid to her to be paid to her children in equal proportions: but if she should leave no children, then the interest and produce to be paid to the survivor as aforesaid. One sister died without leaving children: the survivor is entitled to the interest for life; and the principal is vested in all her children. *Taylor v. Langford*, Vol. III. 119.

5. Bequest to A. for life, with power on her marriage to appoint the interest to her husband for life, and a recommendation to dispose of the principal part after her own death, and the determination of the preceding trusts, among the children of B.: the recommendation being held an absolute trust, it is a

vested interest in all the children, subject to be divested by appointment; and there being none, children born after the death of testator, and those who died in the life of A. are entitled with the rest. *Malim v. Barker*, Vol. III. 150.

6. Legacy to A. for life, and after her decease to her children; if she should leave none, to B. and C. share and share alike, or to the survivor: a vested interest in B. and C. upon the death of testator, as tenants in common; A., though she survived them, dying without children. *Perry v. Woods*, Vol. III. 204.

7. Bequest to the youngest child of A. if she should have any child or children within a certain period; if no child or children within that period, then over: her eldest child, being the only one within the period described, is entitled. *Emery v. England*, Vol. III. 232.

8. Vesting of a legacy postponed to the time of payment, and a limitation over in nature of a cross remainder implied from the general intention. *Mackell v. Winter*, Vol. III. 327.

9. Testatrix gave to A. the dividends of 500*l.* stock until he should attain the age of 32, at which time her executors were directed to transfer the principal to him: the legacy not vested until the age of 32. *Batsford v. Kebbel*, Vol. III. 363.

10. Legacy in trust for testator's mother and sister for life, and after the death of the survivor for all and every the child, &c. of his sister living at her death, share and share alike, each receiving such share at 21; and if but one child surviving, the whole to such child at 21: the payment only is postponed, not the vesting. *Wadley v. North*, Vol. III. 364.

11. Residuary bequest to trustees upon trust to pay the dividends, &c. equally between the testator's

two great-nieces until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively, held a vested interest before marriage; being taken out of the general rule from the civil law, that *dies incertus in testamento conditionem facit*. One of the legatees being dead without having been married, the Court directed one moiety to be paid to her executors; but would not permit the other moiety to be paid, but directed the interest and dividends of that moiety to be paid to the other legatee, with liberty to apply in case of her marriage or her death before marriage. *Booth v. Booth*, Vol. IV. 399.

12. Where an absolute property is given by will, and a particular interest is given in the mean time, it is not a condition precedent, but a description of the time, when possession is to be taken. *Ibid.* 409.

13. Bequest of the residue to A. for life; and after her death legacies were given to B. or to her proper representative, in case she should not be living at the decease of A. and to four other persons or their representatives or representative: one of the four died in the life of the testator; and another survived him, but died in the life of A.; the former lapsed, the latter vested. *Corbyn v. French*, Vol. IV. 418.

14. Construction as to vesting, in what children, and when; and as to the subject upon which the settlement was intended to attach. *Luders v. Anstey*, Vol. IV. 501.

15. Legacy to the testator's wife of the dividends of stock for her life; which he directs, shall be continued in the same stock, and then to be shared equally, share and share alike, to his children that shall be then living: he also gave to his wife a leasehold house (of which

fifty years were unexpired) for her life, and then to be let during the time of the lease to come, and the neat produce thereof to be equally placed in the stocks for the benefit of his children that shall be then living, equally: and as to the residue of his estate whatsoever and wheresoever, the product he gave, &c., the same to be collected yearly to his wife and children equally, share and share alike, that are then living. In other dispositions, the words "then" and "then living" were used with reference to some period expressed, viz. the age of twenty-one, or the death of the person to take for life. The stock and house vested at the wife's death in those children who survived her; the residue vested at the testator's death in his wife and all the children equally. *Reeves v. Brymer*, Vol. iv. 692.

16. Bequest of the dividends of stock to A. for her life; and then to remain in the same stock till each of her children attain twenty-one, and then to be paid their equal share of the same; if any die before twenty-one, to go to the survivors or survivor; and not to be under any claim or jurisdiction of their father or any husband A. may have. Of two children, one died in the life of her mother, married, and above twenty-one. Transfer of a moiety to her administrator, upon the mother's death established: the other moiety vested in the surviving daughter, an infant, so far as to entitle her to the dividends; and a reference was directed as to her father's ability. *Ibid.* 692.

17. Testator bequeathed a leasehold estate (after an estate for life) to his nephew A. and the heirs male of his body lawfully begotten, and in default of such heirs, to one of

the sons of his nephew of B.; as A. shall direct by a conveyance in his life, or by his last will. Another leasehold estate he bequeathed to A. upon trust, subject to certain charges, to employ the remainder of the rent to such children of B. as A. shall think most deserving, and that will make the best use of it, or to the children of his nephew C., if any such there are or shall be. A. dying in the testator's life, the bequest of the latter estate was established in favour of all the children. *Quære*, As to the former. *Brown v. Higgs*, Vol. iv. 708.

The decree affirmed on a rehearing. Vol. v. 495, and afterwards on appeal, Vol. viii. 561.

18. Bequest to the testator's wife for life; then, after an appropriation to answer annuities, to the children of the testator's brothers and sisters. All the children living at the death of the testator and those born afterwards before the death of the wife had vested interests; a codicil in favour of the same objects, only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities. *Middleton v. Messenger*, Vol. v. 136.

19. Testator bequeathed a leasehold estate (after an estate for life) to his nephew A. and the heirs male of his body lawfully begotten, and in default of such heirs to one of the sons of his nephew of B. as A. shall direct by a conveyance in his life, or by his last will. Another leasehold estate he bequeathed to A. upon trust, subject to certain charges, to employ the remainder of the rent to such children of B. as A. shall think most deserving, and that will make the best use of it, or to the children of his nephew C. if any such there are or shall be. A.

dying in the testator's life, the bequest of the latter estate was established in favour of all the children. *Brown v. Higgs*, Vol. iv. 708. — Affirmed on re-hearing, Vol. v. 495, and on appeal, Vol. viii. 561.

20. A clear vested interest not devested: the express contingency, upon which it was to be devested, not having happened. *Harrison v. Foreman*, Vol. v. 207.

21. Legacy in trust for the testator's son for his own use and benefit, provided no misfortune in business shall in the meantime have happened to him, so as to deprive him or his family of the benefit of it; the testator declaring his intention, his son's fortune being amply sufficient, by this fund to form a certain and permanent provision for him or his family: but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife, and children, as the trustees think proper, so long as he shall labour under the effects of any misfortune in trade; but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before) to be paid to him: otherwise the interest to be continued to be paid for the support of him, his wife and children, for his life; and if at his death he shall be under any difficulty from misfortune or failure in business, in trust for his wife and children according to his appointment by will; and, if he shall leave no widow or child, according to his disposition. There was a considerable settlement. The son, in the twenty-eighth year of his age, being discharged under a deed of composition, the legacy was decreed to him; the trustees and his children

not opposing it: but the Court observed, that if he should not be discharged, as in case it should end in bankruptcy, the trustees would not be indemnified. *De Mierre v. Turner*, Vol. v. 306.

22. Under a disposition by will to the children of A. and B. payable at twenty-one, or marriage, with a limitation over upon failure of issue in the lives of A. and B., it was held that all the children without restriction were entitled; and an apportionment being directed, and the interest ordered to be paid to those who had attained twenty-one, children born afterwards, though entitled to a share of the capital, were not allowed to claim the by-gone interest. *Mills v. Norris*, Vol. v. 335.

23. Portions by a marriage settlement, to be paid, transferred, or assigned, to the sons at twenty-one, to the daughters at twenty-one or marriage, if after the death of their parents; with survivorship among them, if any should die before the share or shares should become payable, assignable, or transferable, and a limitation over, if there should be no child or children living at the death of the survivor of the parents, or, being such, all should die, before the fund should become so as aforesaid payable, assignable, or transferable. Whether a child attaining twenty-one takes a vested interest in the life of the parent, *Quære*. *Legh v. Haverfield*, Vol. v. 452.

24. A bequest to a particular description of persons at a particular time vests in persons answering the description at that time exclusively. Therefore an annuity being bequeathed over upon the death of the annuitant to the eldest child of A., there being at the death no

child, an after-born child is not entitled. *Godfrey v. Davis*, Vol. vi. 13.

25. Devise and bequest until a certain period from the nature of the purpose and circumstances not transmissible to representatives. *Ex parte Davies*, Vol. vi. 147.

26. A residuary bequest upon the whole will vested only as the property was received: one of the residuary legatees therefore being dead, his representatives were entitled only to that part which was got in before his death. *Gaskell v. Harman*, Vol. vi. 159; reversed on appeal, Vol. xi. 489.

27. Legacy for the board and education of an infant, until he shall be fit to be put out apprentice, and then a farther sum with him as an apprentice fee: the infant having attained nineteen, and not having been put out, was held entitled to the legacy. *Barton v. Cooke*, Vol. v. 461.

28. The rule taken from the Ecclesiastical Court, that a direction postponing the payment of a legacy does not prevent the vesting, prevails in Courts of Equity as to personal legacies, unless a contrary intention can be inferred; as where the time of payment forms part of the description of the person to take. The vesting of a residuary bequest is especially favoured, to prevent an intestacy; and a direction, that the interest should accumulate, and be paid with the capital, after a deduction for maintenance and preferment, is not sufficient to prevent it. As to real estate, the contrary rule prevails, but subject to exceptions. *Bolger v. Mackell*, Vol. v. 509.

29. The testator having given his wife the option to occupy his house at a certain rent, and, if she should

choose to do so, declared; she should have the use of the furniture, by codicil, revoking the bequest of an annuity to her, gave her a legacy, to provide furniture, in case she should not choose to occupy his house, or for any other purpose she should think proper. She occupied the house and furniture till her death; and her executor was held entitled to the legacy. *Isherwood v. Payne*, Vol. v. 677.

30. The word "when" in a will, alone and unqualified, is conditional; but it may be controlled by expressions and circumstances: so as to postpone payment or possession only, and not the vesting: as, where the interest of the legacy in the interval was directed to be laid out at the discretion of the executors for the benefit of the legatees, it vested immediately. *Hanson v. Graham*, Vol. vi. 239.

31. In the civil law, the words "cum" and "si," as referred to legacies, are equivalent, and from that law, this rule and most of our other rules upon legacies are borrowed. *Ibid.* 243.

32. Distinction between a legacy at twenty-one, and payable at twenty-one, borrowed from civil law, but disapproved. *Ibid.* 245.

33. A direction for maintenance has not the same effect in favour of vesting as giving interest. *Ibid.* 249.

34. Legacy after limitations for life, and in default of children to be paid equally between two persons, or the whole to the survivor of them, held not vested till the time of division. *Daniell v. Daniell*, Vol. vi. 297.

35. Bequest to A., her executors, &c. provided, that in case she should die under twenty-one, or without leaving any husband living at her

death, it shall go over, vested at twenty-one upon the intention: the word "or" being construed "and." *Weddell v. Mundy*, Vol. vi. 341.

36. A bequest for all and every the child and children of A. includes every child born before the period of distribution; which in this case was the attainment of the age of twenty-one by the eldest, the marriage of a daughter, or the death of a child under twenty-one, leaving issue. Upon the general rule, a child by a subsequent marriage was included, notwithstanding a strong implication in favour of children by the prior marriage. *Barrington v. Tristram*, Vol. vi. 345.

37. Testator directed the residue of his personal estate, subject to the payment of legacies, annuities, debts, and funeral expenses, with all convenient speed to be laid out in real estates, to be settled in strict settlement; and that the interest of such residue should accumulate, and be laid out in lands to be settled in like manner. Various circumstances having delayed the collection and investment of the personal estate, the tenant for life was held entitled to the interest from the end of a year after the death of the testator. *Sitwell v. Bernard*, Vol. vi. 520.

38. Vesting under words importing a tenancy in common, though combined with words of survivorship, the interests vested at the death of the testator; and therefore vested in one of the legatees, who died between the death of the testator and the death of the person entitled for life. *Brown v. Bigg*, Vol. vii. 279.

39. Legacy, when the legatee shall attain twenty-one, may be so controlled by the apparent intention, as to postpone the possession only, not the vesting; as where it was to two children, when they shall

attain twenty-one, to be equally divided between them, share and share alike; appointing their father in trust for the same, and trustee for them during their minority; and in case of the death of either, the survivor to take the whole; and in case both die in their minority, over. *Branstrom v. Wilkinson*, Vol. vii. 421.

40. Bequest to the testator's three children to be equally divided between them, share and share alike, but in case of the death of any without being married and having children, the share of such child dying to be divided between the surviving children, and so if one should only survive: one being married and having a child, her share vested. *Ripley v. Waterworth*, Vol. vii. 453.

41. Construction of a will, giving a vested interest, though subject to a contingent charge; and creating a tenancy in common as to part of the property, and as to the residue a joint-tenancy; there being nothing to control the legal effect of the words. *Jackson v. Jackson*, Vol. vii. 534.

42. Bequest to three children in thirds respectively; with a direction, that they should not be put in possession till their respective attainment of particular ages: and in case of the death of either of the above-named children before the ages mentioned, that third to be equally divided between the two surviving children; and in the event of the death of two before the respective ages above-mentioned, then the whole to devolve to the surviving child: but should all his children die before they should attain their said respective ages, then the whole of his estate was given over. One died having attained the age mentioned. Afterwards another

died under that age. The share of the latter a vested interest in the child, who died first, and the survivor, attaining the age specified. *Wilmot v. Wilmot*, Vol. VIII. 10.

43. Legacies to two sisters; with a direction in case of the death of each, reciprocally, to devolve to the other. That direction confined to the case of lapse by the death of either in the life of the testator; and did not prevent the vesting absolutely. *Cambridge v. Rous*, Vol. VIII. 12.

44. Residuary bequest to the testator's daughter for life, and to her children at their ages of twenty-one; and after the decease of his daughter, and of her children under that age, to go and be distributed among his relations in a due course of administration. Great nephews and great nieces, the next of kin of the testator at the death of the daughter, entitled, against the claim of the personal representatives of the daughter, the sole next of kin at the death of the testator, and of the representatives of nephews and nieces, who died in her life, insisting, that she was excluded by the will. *Jones v. Colbeck*, Vol. VIII. 38.

45. Bequest to the children of A. vested at the age of twenty-one; therefore those born after one has attained that age, are excluded. *Paul v. Compton*, Vol. VIII. 380.

46. Devise to the testator's wife for life; and as soon after her decease or refusal to release dower as conveniently might be, upon trust to sell and divide the produce between five nephews at such time as the sale should be completed, if then living: if any should die in her life, or before the sale should be completed, his share to his children; if none, to the survivors. The interests not vested till the sale. *Elwin v. Elwin*, Vol. VIII. 546.

47. Devise to testator's wife for life, and after her decease to trustees to sell and pay certain legacies, and to lay out 500*l.* upon government or other securities, part of the money in the purchase of an annuity for the life of his son, and permit him to receive the same for the term of his natural life, held a vested interest in the son who survived the testator, but died in the life-time of the widow. *Bayley v. Bishop*, Vol. IX. 6.

48. Such a direction also held to mean the purchase of an annuity for life, and not to be laid out in such securities; the legatee only to receive the interest for life, the will making other dispositions both as to capital, stock, and dividends. *Ibid.*

49. Upon a bequest of personal and money arising from the sale of real estate to the wife for her life, and afterwards to be divided between testator's brothers and sisters named in the will, in equal shares; but in case of the death of any of them in the lifetime of the wife, his or her share to be divided equally among his or her children, and in the event one died in the life of the testator's wife leaving no child, held that the share vested in the deceased brother, and his representative entitled. *Smither v. Willock*, Vol. IX. 233.

50. A bequest to *J. H. L.* for his second daughter that he shall have born, for her education until she attain twenty-one, and after the interest to her and her heirs for ever, she being christened *Z. J.* (testatrix's name); there was also a second bequest to the same *J. H. L.*, till the said second daughter shall attain the age of twenty-one; and after she shall attain twenty-one, to her and her heirs for ever, not expressing the purpose of education, held that both bequests vested in

2. *J.* though she died under twenty-one, being only an exception out of the generality of the bequest to the child. *Lane v. Goudge*, Vol. ix. 225.

51. Bequest to and among the children of testator's daughters born or to be born, to be paid in equal shares when and as the said grand children should attain twenty-one, or be married, with survivorship; and in case all should die before twenty-one or marriage then over, held that the shares vested when the first child attained twenty-one, and were payable according to the then proportion to the exclusion of those that might be born afterwards. *Whitbread v. Lord St. John*, Vol. x. 152.

52. Upon a bequest to the younger children of *A.*, held that an only surviving child was entitled to the exclusion of another, who had become the eldest. *Lady Lincoln v. Pelham*, Vol. x. 166.

A bequest to the children of *A.* and *B.* after life interests to the latter, with cross limitations if either should leave no issue, held to be vested interests in the children, the contingency being of a species which did not prevent the vesting. *Ibid.*

But such legacies are distributable among the children *per capita*, and not *per stirpes*. *Ibid.*

53. On a gift to a brother and the children of a deceased brother, they take *per capita*, though the law would have given it in moieties. *Ibid.* 176.

54. Bequest to the younger children of *A.* held that a child, who at the death of testator answered the description of a younger child, but the eldest dying he became entitled to his provision, and it was expressly directed that the interest should not vest till twenty-one in the younger,

held that he not having attained twenty-one when he became the eldest, was not entitled. *Bowles v. Bowles*, Vol. x. 177.

55. Bequest to *A.*, and all other children hereafter to be born at their respective ages of twenty-one, held that all born after *A.* attained twenty-one, were excluded. *Gilbert v. Boorman*, Vol. xi. 238.

56. Bequest of stock to *A.* payable at a certain age, order made for it to be transferred to his attorney. *Hill v. Chapman*, Vol. xi. 239.

57. The Chancellor afterwards held that, though if the testator had clearly expressed a purpose that the residue should not be vested until actually collected and converted into money, the Court must execute that purpose, nothing but the strongest words should compel the Court to make such a construction. The declaration of the former decree upon the principle, that it was vested only as it was received, was therefore reversed. *Gaskell v. Harman*, Vol. xi. 489.

58. Legacies directed to be paid out of rents and interest, held to be a disposition only of the income, and an intestacy as to the capital. Bequest to children under the age of John (the elder brother) held to be an exclusion of John, he having a distinct legacy. Legacy, not given as a substantive gift with time of payment appointed afterwards, but the time annexed to the very gift, held not to vest until that period. *Sansbury v. Read*, Vol. xii. 75.

59. Bequest of residue, &c. to apply rents, &c. to the maintenance of the children of testator's daughters equally, until the youngest should attain twenty-one, and in case of the death of any one before that period having a child, &c. such child

to receive the parent's share, and on the youngest of such grand children attaining twenty-one, one proportionable share to the use of each of such grand children as should be then living, and the children of any such grand child dying before the period of distribution, leaving issue, to have the parent's share, and to the heirs, executors, &c. of such grand children and great-grand children, held, that a grand child dying before the youngest attained twenty-one, would take no share by his representative, but grand children born after the testator's death would be entitled. *Hughes v. Hughes*, Vol. xiv. 256.

60. Upon a bequest to children of testator's two daughters payable at 21, or the marriage of daughters, with survivorship as to the shares of those dying in the meantime, with an ulterior limitation to brothers' children in the event of the daughters dying without issue, or having had issue, if such issue should die in the lifetime of the daughters; held, that the interest of a child attaining 21 survived to his representatives, subject to the ulterior contingent limitation. *Bayard v. Smith*, Vol. xiv. 471.

61. Bequest of the produce of the sale of a copyhold estate to *A.* the wife of *B.* for life; and after her death to divide the principal among the children of *B.* and *C.* equally; and of the testator's reversionary interest in Bank Stock on the death of *D.* if in his name at his decease, and if not, at *D.*'s death, equally among the same children.

Vested interests in all the children; comprising those who died, and those who came into existence after the death of the testator, and during the lives of the tenants for life. *Walker v. Shore*, Vol. xv. 122.

62. Under a legacy to the children of *A.* those born before the time of distribution are entitled to share, unless a time of distribution is expressly provided; excluding those born afterwards, by the necessity of a previous distribution. *Ibid.* 125.

63. Construction of a trust, by deed, of money to accumulate, until the grantor's grand children, then living, or to be born, respectively attain twenty-one; and on attaining, &c. to pay to each, as they should respectively attain such age, their respective shares; to be ascertained by the number in being as they respectively attain twenty-one without regard to such as might afterwards be born.

No interest vested until payment: the measure of distribution is the number existing at each period; those, who had received, have no farther claim upon the fund, increased by shares falling in: therefore, one dying under twenty-one, after all the others had received their shares, or died under twenty-one, that share is undisposed of by the deed; and passed by a bequest of "all effects whatsoever," following specific descriptions of property. *Campbell v. Prescott*, Vol. xv. 500.

64. Bequest of 3000*l.* on trust to apply the dividends to the maintenance of *A.* until twenty-one, and afterwards to pay the whole dividends to him for life, with power to the trustees before his age of twenty-six to raise and pay, not exceeding 600*l.*, towards or in order to his preferment or advancement in life, or his other occasions, as they should think proper.

Upon a claim of the whole at the age of twenty-one as absolute property, inquiry directed as to his circumstances, and whether they required the advancement at any and what part, before he should attain

twenty-six. *Robinson v. Cleaton*, Vol. xv. 527.

65. Trust by will subject to an interest for life, to pay and transfer to the testator's nephew and nieces equally at twenty-one; with survivorship in case any should die, before his or their shares should become payable, and a limitation over, in case all should die, &c. Vested interest at twenty-one, before the death of the tenant for life. *Halifax v. Wilson*, Vol. xvi. 168.

66. Trust to pay the dividends of stock to the testatrix's niece for life, and after her death to divide the capital among the brother and sisters of the testatrix, and in like manner, to the survivors or survivor of them. The shares of those who died in the life of the niece, passed to their representatives. *Ibid.*

67. Legacy at the decease of a person, entitled to the fund, out of which it is given, vested immediately, and payment only postponed. *Blamire v. Geldart*, Vol. xvi. 314.

68. Legacy to the three children of *A.* the sum of 600*l.* each. Four children, all born before the date of the will, entitled to 600*l.* each. *Garvey v. Hibbert*, Vol. xix. 125.

And see WILL [B.] 43.—PORTIONS, *passim*.

[L.] RESIDUARY.

And see DEVISE 40, *et seq.*—RESIDUE.—EXECUTOR, [B.]

1. Legacies in trust for all grand children then in existence by name, to sons at twenty-three, daughters at twenty-one; mesne interest for education, surplus to accumulate; with survivorship for want of issue: residue for all the grand children generally for their benefit "as aforesaid:" by codicil a fund set apart to pay life annuities: grand child born after testator's death not entitled to a share of the residue; into which

the fund under the codicil falls after the purpose answered. *Hill v. Chapman*, Vol. i. 405.

2. Residue bequeathed to relations in the proportion the testator had given the other part of his fortune: pecuniary legatees only are entitled: not a devisee of real estate. *Maitland v. Adair*, Vol. iii. 231.

3. Testator gave all the residue of his personal estate to his wife, except such parts as should be in and about his house; which part he gave to his son; and directed the household furniture to go to their looms; and gave all arrears of rent, which should be due to him at his death, to his son; a bond to secure an old arrear of rent, and cash, both found in an iron chest, in which the steward kept the cash arising from the rents, belong to the residuary legatee. *Jones v. Lort*, Vol. iv. 166.

4. Testator gave certain leasehold houses in trust for *A.* absolutely for her separate use, and other leasehold houses in trust for *B.* for her separate use for life; and after her decease for her children; if none, to fall into the residue; and he gave the residue in trust for *A.* and *B.* to be divided between them share and share alike, and to be paid and applied in like manner for their use and benefit as the rents and profits of the leasehold premises herein before settled upon them; and their receipts to be a sufficient discharge. The reference in the residuary clause is, not to the interests of *A.* and *B.* in the houses, but to the provision, that they shall take for their separate use; therefore they take the residue absolutely. *Shanley v. Baker*, Vol. iv. 732.

5. General residuary clause passes all that is not sufficiently disposed of, as in case of lapse. *Brown v. Higgs*, Vol. iv. 708.

6. Under a residuary disposition

10. testator's right heirs on his mother's side, his sister and nephew by a deceased sister are entitled against remote relations claiming on the ground of an express provision, by an annuity for the separate use of the sister. *Forster v. Sierra*, Vol. iv. 766.

7. A legacy out of the produce of a copyhold estate, directed to be sold, failing, was held to pass by the residuary clause against the heir; the object being a general conversion out and out. *Kennell v. Abbott*, Vol. iv. 802.

8. Residuary bequest to the testator's nephews and nieces *per stirpes* equally for their lives; and after the death of either that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in manner aforesaid. Upon the death of one without a child that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares, but upon the death of last survivor without a child, his shares, both original and accrued, are undisposed of; notwithstanding another has left a child. *Milsom v. Awdry*, Vol. v. 465.

9. Under a residuary bequest to the legatees in proportion to their legacies, all legatees, pecuniary and specific, even of rings, &c. not expressly or by implication excluded, were held entitled: so annuitants, if they had not been excluded upon the construction of the whole will. *Nannock v. Horton*, Vol. vii. 391.

10. Residuary clause passes all personal property, that is not disposed of, as by lapse, contended upon the particular expressions to

have been separated, and not intended to pass with the residue. *Cambridge v. Rous*, Vol. viii. 12.

11. Pledge of bonds, part of the testator's assets, by executors to secure a sum borrowed by them sustained; the bill being filed not by legatees but by co-executors who had not before acted. *M Leod v. Drummond*, Vol. xiv. 353.

12. Residuary or general legatees not permitted to question the disposition made by the executors of the assets; creditors or specific legatees only can do so. *Semble*, the former may also do it in case of circumstances amounting to legal fraud. *Ibid.* 364.

13. General residuary disposition of real and personal estate, "not herein before specifically disposed of," held to comprehend specific legacies lapsed; the word "specifically" being construed "particularly." *Roberts v. Cooke*, Vol. xvi. 451.

14. Residuary bequest in trust for the use and benefit of *A.* and in case of her death to be equally divided between the children of *B.* Payment decreed to the executor of *A.* as having taken the absolute interest. *Ommaney v. Bevan*, Vol. xviii. 291.

[M.] WHEN AND OUT OF WHAT FUNDS PAYABLE.

1. Legacies not distributable till a year after testator's death. *Hill v. Chapman*, Vol. i. 408.

2. Where testator by will duly attested, reserved to himself a power to declare his real estates charged with future legacies, by an unattested instrument, held that a legacy charged upon real estate by an unattested codicil, was void. *Rose v. Cunynghame*, Vol. xii. 29.—And see *Habergham v. Vincent*, Vol. ii. 204.

A charge of debts and legacies upon real estate by will duly exe-

cuted, will cover future debts and legacies though by an unattested instrument, being a fluctuating charge and impossible to be previously ascertained. *Ibid.* 37.

3. The decisions, that land charged with legacies by a will duly executed is liable to legacies given by an unattested codicil, do not go upon a power reserved to the testator to increase the charge by a future act, which cannot be, but upon analogy to the case of debts. The rule has not been extended to the case of a primary charge on land, but only to a charge in aid of personal; from the fluctuating nature of which it is necessarily uncertain. *Habergham v. Vincent*, Vol. 11. 236.

4. Devise of land to be sold: money produced by the sale charged with simple contract debts on implied intention. *Kidney v. Coussmaker*, Vol. 11. 267.

5. This clause beginning a will "First, I will and direct, that all my legal debts, legacies and funeral expenses, shall be fully paid" is not sufficient alone to charge legacies on real estates specifically devised; for which the intent must be clear. *Kightley v. Kightley*, Vol. 11. 328.

6. Where testator means for a valuable or meritorious consideration to create a charge, which by law he cannot, equity will aid the intention, and even supply a defect, as the want of a surrender: but the intent must be clear. *Ibid.* 332.

7. A legacy substituted for another shall be raised out of the same fund and subject to the same conditions. *Crowder v. Clowes*, Vol. 11. 449.

8. Testator by will duly attested, gave an annuity to his daughter charged on his real estate in aid of his personal; by codicil not attested

he gave his real and personal estate to his mother for life; during her life, the personal estate is discharged from the annuity, but it remains charge on the real. *Buckridge Ingram*, Vol. 11. 652.

9. Testator gave his personal estate to his mother for life, remainder to his children, on condition that his mother should see the fine for renewal of a lease and the interest of a mortgage paid, and he consulted as to the manner of raising the fines that she might approve as she thought proper; held that she was only to keep down the interest. *Ibid.*

10. When real estate is charged with legacies generally by will duly attested, legacies may be revoked or charged by an unattested instrument. *Ibid.* 665.

11. Legacy payable at twenty-one; before which time the legatee dies: a person claiming by limitation over takes immediately: but the administrator of the infant must wait till the time at which the legacy is payable, unless the whole interest is given. *Crickett v. Dolby*, Vol. 111. 15.

12. Testator gave 100*l.* in trust, to pay the interest to *A.* till her daughter *B.* shall attain twenty-four, and then he gave the said 100*l.* and the interest then due, to her said mother *A.* This legacy decreed to the daughter at the age of twenty-four. *Clark v. Norris*, Vol. 111. 362.

13. The distinction between a legacy given at twenty-one and one payable at twenty-one is a positive rule of the Ecclesiastical Court, adopted as to personal legacies, but not as to real estate; and not approved, or to be extended. *Mackell v. Winter*, Vol. 111. 543.

14. Trust term in a will to raise out of real estates several sums; of which some were secured by the

testator's bond and covenant, the intention being to give them as portions out of the land, not as debts or legacies; the personal estate is not applicable. *Reade v. Litchfield*, Vol. III. 475.

15. Charge of legacies by implication upon a fund arising from the accumulation of rents and profits, dividends, and interest. The other questions were not determined: 1st, whether the real estate was charged by implication from words, which could be otherwise satisfied; and, if not, whether the will directing an estate to be purchased, and settled upon the testator's son with remainders over, for which the testator afterwards contracted, and the purchase money having been paid out of the personal estate under a power in the will for that purpose, the legatees by marshalling could have the benefit of the vendor's lien upon the estate for the purchase money. *Austen v. Halsey*, Vol. VI. 475.

16. The Court will look at principles of convenience; as in the rule, that legacies shall be payable at the end of a year. *Sitwell v. Bernard*, Vol. VI. 539.

17. Legacies not paid under a charge upon real estate in aid of the personal without production of the stamp under the legacy act, 36 Geo. 3. c. 52. § 7. until it is ascertained, that there is no personal estate applicable. *Holme v. Stanley*, Vol. VIII. 1.

18. Right of legatees to stand in the place of specialty creditors, paid out of the personal estate, against estates descended. Not against specific devisees, unless devised subject to debts or a mortgage. *Aldrich v. Cooper*, Vol. VIII. 396, 397.

19. Legacies and annuities charged upon a mixed fund of the personal estate and the produce of real estate

under a direction for sale. A different disposition of the whole by a codicil failing as to the real estate, for want of a due execution, the charge remains upon the real estate. *Shedden v. Goodrich*, Vol. VIII. 481.

20. Payment of a legacy presumed after above forty years without demand. Answer of one defendant not evidence against the rest. Evidence of bond creditors of testator not admissible to obtain a decree for payment of a legacy, as they must be preferred to legatees. *Jones v. Tuberville*, Vol. II. 11.

[N.] INTEREST.

1. Interest of legacies to be computed from a year after testator's death, unless some other time appointed by testator: but he cannot make executor answer interest beyond what the law has done. *Hutchins v. Mannington*, Vol. I. 367.

2. A legacy from an uncle to a niece to be paid at twenty-one or marriage, does not carry interest before the time of payment. *Crickett v. Dolby*, Vol. III. 10.

3. Legacy from a parent to a child bears interest before the time of payment, and from the death of the testator; and is the only instance. *Ibid.* 13.

4. Legacy payable at twenty-one, before which time the legatee dies; if interest is payable, his executor shall have the legacy immediately; if not, he must wait till the legatee would have been twenty-one, and cannot have the interest. *Ibid.* 13.

5. A wife, as well as child, is within the exception to the rule, that a legacy does not bear interest till it is payable. *Ibid.* 16.

6. Legacy from parent to child payable *in futuro*, if maintenance is given generally it shall carry interest: but if an annual sum, less than the interest, is given for maintenance,

the executor paying that shall have the rest. *Ibid.* 17.

7. Legacy to a father the better to enable him to provide for his younger children: he consented to secure the capital; but was held entitled to the interest. *Brown v. Casamajor*, Vol. iv. 498.

8. The general rule, that a legacy payable in future shall not carry interest before the time of payment, applies to a legacy to infants payable at twenty-one: the exceptions are the case of parent and child, the case of a residue, and where from other special circumstances an intention to give interest clearly appears. *Tyrrell v. Tyrrell*, Vol. iv. 1.

9. Interest given at $4\frac{1}{2}$ per cent. *Cox v. Chamberlain*, Vol. iv. 631.

10. Under an agreement to take off a discount above 5 per cent. for prompt payment, though according to the custom of the trade, the creditor cannot upon failure charge more than 5 per cent. *Ex parte Aynsworth*, Vol. iv. 678.

11. Legacy of a sum of money Jamaica currency decreed with Jamaica interest from the death of the testator. *Raymond v. Brodbelt*, Vol. v. 199.

12. General rule, that legacies, where no interest is given by the will, shall carry interest at 4 per cent. only, and from the end of a year after death of the testator, except where it is given by way of maintenance; though the fund produces more; and the interest shall not be increased by the effect of appropriation. *Sitwell v. Bernard*, Vol. vi. 520.

13. In all cases of legacy, interest only from the end of a year from the death, unless otherwise directed: the old rule, depending upon the fund, as productive or barren, being exploded. *Gibson v. Bott*, Vol. vii. 97.

14. Bequest of monies and interest to testator's great nieces, equally

to be divided and paid to them respectively at twenty-one, with authority to the trustees to expend for their necessary maintenance, the surplus to accumulate for their benefit, held that the accumulated interest went with the principal, except what was applied in maintenance. *Sisson v. Shaw*, Vol. ix. 285.

Maintenance allowed for time past. *Ibid.* 288.

15. Upon the bequest of a residue payable at a future time, parties entitled to interest for their lives, although they did not live to receive the principal, and whether interest was or was not mentioned. *Ibid.* 289.

16. Where the property bequeathed to testator's widow for life consisted of a share in a partnership trade, under the articles of which it was stipulated, that if the death of either partner happened three months preceding 30th June, the trade should be carried on on the joint account of the surviving partners and heirs of the deceased until the 30th June following the death, and testator died in May, held that she was entitled to interest upon the amount of capital so formed at the end of thirteen months, but not the profit; and interest upon the capital after the termination of the partnership, though not collected in and lying dead, calculated at the periods they were directed to be collected. *Fearn v. Young*, Vol. iv. 549.

17. Legatees residing in Jamaica, of legacies in currency, and executors also residing there, held not entitled to Jamaica interest. *Bourke v. Ricketts*, Vol. x. 330.

The ground for giving interest upon legacies after a year is the presumption that the property is got in at that time, and is making interest. *Ibid.* 333.

18. The fund being ample, order made on motion for payment of a legacy in part. *Pearce v. Baron*, Vol. xii. 459.

The rule that a legacy does not bear interest until the time it is payable, not excepted in favour of a wife. *Stent v. Robinson*, Vol. xii. 461.

19. Where legacies were directed to be paid out of mortgage monies (bearing 5 per cent.) "when the same shall be recovered," held that those words did not postpone or suspend the right of the legatees to interest, and 4 per cent. was decreed from the death of the testator. *Wood v. Penoyre*, Vol. xiii. 325.

20. This Court, by a rule adopted for the sake of general convenience, holds the personal estate to be reduced into possession within a year after the death of the testator, and upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will; the right to payment exists and carries with it the right to interest until actual payment. *Ibid.* 334.

21. Interest upon a legacy to a wife or natural child not allowed from testator's death; as it is in favour of a legitimate child, by way of maintenance. *Lowndes v. Lowndes*, Vol. xv. 301.

22. Charge by will on real estate of simple contract debts of another person considered as a legacy, carrying interest from the death of the testator at 4l. per cent. *Shirt v. Westby*, Vol. xvi. 398.

23. Legacy in a foreign country and coin, as sicca rupees by a will in India: if paid by remittance to this country, the payment must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance.

So as to other countries. *Cockerell v. Barber*, Vol. xvi. 461.

24. Legacy without any interest to A., if claimed within five years from the testator's death; if not, the same sum without interest as aforesaid to B.; no claim being made by A., decreed to B., with interest from the end of five years at 4 per cent. *Careless v. Careless*, Vol. xix. 601.

[O.] MISTAKE.—UNCERTAINTY

And see DEVISE, 17. 111.

1. Annuity bequeathed to testator's brother Edward for life, remainder to his children by his present wife. At date of the will he and his wife were dead; and their children had other legacies under it; and testator had only one brother, Samuel, whom he had been in the habit of calling Edward and Ned. His children held to be entitled upon these circumstances. *Parsons v. Parsons*, Vol. i. 266.

2. A wrong description of a legatee will not defeat a legacy given to him by name. *Standen v. Standen*, Vol. ii. 589.

3. Legacy to Mrs. G. evidence admitted. *Abbot v. Massie*, Vol. iii. 148.

4. Testator bequeathed part of his 3 per cent. consolidated Bank annuities, upon evidence that he had no bank stock at the date of his will or at his death, but that he had 3 per cent. South Sea annuities, the legacy was established out of that fund. *Dobson v. Waterson*, Vol. iii. 308.

5. Testator gave a sum, part of his 4 per cent. Bank annuities, to his wife for life, and after her decease, to several relations; evidence was admitted that he had no such stock at the date of the will, having previously sold it all, and invested the produce in long annuities, and to show the cause of the mistake; and

the legacies were established. *Selwood v. Mildmay*, Vol. III. 306.

6. Testator by his will gave legacies to A. and B., describing them as grand children of C., and their residue in America. By a codicil he revoked these legacies, giving as a reason, that the legatees were dead; the fact not being true, they were held entitled, upon proof of identity. *Campbell v. Fruth*, Vol. III. 321.

7. Legatee entitled, notwithstanding a mistake of his name. *Ibid.* 322.

8. The capital of the residue passed by implication, though the interest and dividends only were expressly disposed of; but a mistake or omission cannot be corrected or supplied, unless it clearly appears by fair inference from the whole will. *Holford v. Wood*, Vol. IV. 57.

9. Legacy of 2400*l.* in the five per cent. consolidated Bank annuities: decreed, that 2400*l.* five per cent. annuities, viz. Navy bills should be purchased; evidence of the intention and mistake as to the fund being rejected. *Chambers v. Minchin*, Vol. IV. 675.

10. Legacy to — Price, the son of — Price: upon the evidence, the plaintiff, the only claimant, was declared entitled. *Price v. Page*, Vol. IV. 680.

11. By the civil law, a false reason given for a legacy, is not of itself sufficient to destroy it, unless fraud; from which it may be presumed, that if known, it would not have been given. *Kennell v. Abbot*, Vol. IV. 808.

12. If a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the rule of the civil law is adopted, and the legacy fails. Therefore where a legacy was given by a woman to a

man in the character of her husband, whom she supposed and described as such, but who, at the time of the marriage ceremony with her, had a wife living, the Court, in respect of his conduct, held him not entitled; but inclined to think it would be otherwise, where, from circumstances not moving from the legatee himself, the description is inapplicable; as where a testator gives a legacy to a child from motives of affection, supposing it his own, but is imposed upon in that respect. *Ibid.* 802.

13. Though the Christian name of the legatee was mistaken in the will, the legacy was established upon the description and evidence notwithstanding great delay in filing the bill. *Smith v. Coney*, Vol. VI. 42.

14. A bequest "to the children of Robert H., late of Norwich and now of London, 100*l.* a piece." It appeared, that a Robert H. left N. at the age of fourteen, and lived in L., but was dead at the date of the will, leaving only one child; that a George H., formerly resident at N., lived in L. at the time of the testator's decease, having several children, some of whom were resident at N., and in habits of intimacy with the testator: both Robert and George H. were distantly related to him. The Court refused to vary the will upon this evidence. The executrix having paid the legacy to a trustee for one of the children of George H., held also, that the fact of the plaintiff having been witness to the receipt, did not bar his right to recover the legacy given by the will, being a mere acquiescence, and not amounting to a release or fraud. *Holmes v. Custance*, Vol. XII. 279.

15. Legacy "to my namesake, Thomas, the second son of my brother John," there being no son named Thomas, established in favour of the second son William; as an er-

roneous description, not a condition. *Stockdale v. Bushby*, Vol. XIX. 381.

16. Legacy "to Robert C., my nephew, the son of Joseph C." Other clauses describing "my nephew, Robert C." generally; and one legacy "to my nephew, Robert C." "the son of John C." The testator had only two brothers, John and Thomas C., each having a son, named Robert C.; parol evidence admitted to resolve this latent ambiguity; showing intimacy with the son of John, and very slight knowledge of the other: and the legacy was decreed to the former. *Careless v. Careless*, Vol. XIX. 601.

17. Evidence admissible to resolve a latent ambiguity upon facts dehors the will; as upon a legacy to the testator's nephew Robert, there being two nephews of that name, presumption in favour of one, proved to have been intimately known to the testator. *Ibid.* 604.

[P.] MISCELLANEOUS.

1. Testator gave all his waggon-ways, rails, staiths, and all implements, utensils, and things, at his death used or employed together, with, in, or for the working, management, or employment of his collieries, and which may be deemed as of the nature of personal estate, in trust to be held, used, or enjoyed with the collieries: under this bequest, and upon the circumstances, money due from the fitters and others, and in the Tyne Bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and various other articles of the stock in trade, passed. *Stuart v. Earl of Bute*, Vol. III. 212.

2. "I return to A. his bond" in a will, is not a release, but a legacy; and having lapsed, the bond remains in force against a surviving co-obligor. *Maitland v. Adair*, Vol. III. 231.

3. Under a bequest of the use of a house, with all the furniture and stock of carriages and horses, and other live and dead stock, for life, plate passed: wines and books did not. *Porter v. Tournay*, Vol. III. 311.

4. Admission, that there is standing in the names of the executors upon the trusts of the will a considerable sum in the three per cents., and offering an appropriation, was held sufficient to entitle the plaintiff, a contingent legatee, to move for that purpose; and by consent, the order was made, as upon admission of assets sufficient to satisfy the plaintiff's demand, to transfer, &c. *Pullen v. Smith*, Vol. v. 21.

5. Legacy general, notwithstanding an appropriation of part of the property. *Raymond v. Brodbelt*, Vol. v. 199.

6. If a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way, as if it was to put him into orders, and he became a lunatic. *Barton v. Cooke*, Vol. v. 463.

7. Legacy for a mourning ring to each of the testator's relations by blood or marriage, confined to the statute of distributions, and to those who have married persons entitled under it. *Devisme v. Mellish*, Vol. v. 529.

8. Whether a sum of money directed to be placed out to produce an annuity, is to be considered as legacy or annuity with reference to the time of payment, *Quære. Gibson v. Bott*, Vol. VII. 97.

9. Bequest to A. or B. void for uncertainty: if at the discretion of C., good. *Longmore v. Broom*, Vol. VII. 128.

10. A charge of legacies held a charge of annuities. *Nannock v. Horton*, Vol. VII. 402.

11. Bequest to executors in trust that they shall pay, &c. unto and

amongst the testator's two brothers and his sister, or their children, in such shares, &c. and at such times, &c. as the trustees, or the major part, or the survivor, his executors, &c. shall think proper. All the children living at the death of the testator held entitled with the parents, *per capita*; the Court not having a discretion. *Longmore v. Broom*, Vol. VII. 124.

12. A legatee refusing to accept a bequest, on account of burthens attached, yet held entitled to other distinct dispositions. *Andrews v. Trinity Hall, Cambridge*, Vol. XIX. 525.

13. Bequest of debts due on mortgages, bond, &c. from certain persons, held upon analogy to a similar bequest in another clause to extend to judgment. *Stenhouse v. Mitchell*, Vol. XI. 352.

14. Upon a bequest of "goods and chattels," every thing will pass; but if those words come after furniture, they will be restrained to things *ejusdem generis*. *Stuart v. Marquis of Bute*, Vol. XI. 666.

15. Bequest of Bank stock to a party for life, held, that upon an order by the Court of Directors of a dividend of "5l. per cent. interest and profits for the half-year," the tenant for life was entitled. *Barclay v. Wainwright*, Vol. XIV. 66.

16. Under a bequest "to all my other servants," a coachman furnished by a jobmaster not entitled. *Chilcot v. Bromley*, Vol. XII. 114.

17. Bequest to a testator in India, "to my nearest surviving relations in my native country, Ireland," confined to brothers and sisters living in Ireland or elsewhere: the addition of a mistaken description, viz. of the place of residence, not vitiating a gift to persons otherwise sufficiently described. Nephews and nieces excluded. *Smith v. Campbell*, Vol. XIX. 400.

18. Under a bequest to three per-

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sons named, and such others as testator should afterwards name, no other being afterwards named, whether those named should not take. *Quære. Mills v. Farmer*, Vol. XIX. 49.

LIEN.

And see TRUSTEE, 4. 11.—VENDOR AND PURCHASER, [A.]

1. Assignment of rents and profits is an equitable lien, and assignee may insist on a mortgage. *Ex parte Wills*, Vol. I. 162.

2. An equitable lien is an equitable obligation to do according to conscience; and a devise of it good in equity. *Perry v. Phillips*, Vol. I. 255.

3. Bond by infant for a just debt: his mother and infant sister being entitled on death of A. without issue, to 4000l. stock for the mother for life, after to her children according to appointment; if no children, to the mother, after death of the son covenanted to pay that debt, when either should become entitled to that stock. Upon marriage of the daughter, the mother made an appointment of the stock in her favour; but next day the husband having notice of, and approving the covenants to pay the son's debt, and reciting his and his wife's intention to secure it "as after mentioned," released all their right to that stock to the mother, and covenanted, that when the wife should be twenty-one, all their interest should be vested in her; and a trust was declared, that if the obligee should have a right to recover that debt, it should be paid out of that stock. Afterwards, a bill being filed to set aside the settlement as an appointment by the mother for her own benefit without consideration, the parties were by agreement mutually released from the covenants in it; and the hus-

band covenanted, that if the obligee should have a right, in life of the mother, to recover the debt, it should be paid out of that stock. The mother died intestate before A. Determined, that a fair assignment of the debt had no specific lien on the fund; which could be liable only by being brought back into the mother's assets, as taken out in fraud of her creditors: for which it must be said, either that there was no pretence for the compromise, or that no pretence for its providing for the debt only, if suable in the mother's life: but the marriage brocage in the settlement was sufficient ground for the compromise, and the bill did not go on the other ground; therefore the common decree for account of assets, debts, and funeral expenses, without reference to that and, was made against the husband and wife as administrators. The debt of the son was a sufficient consideration for the covenants; and if the mother had survived A. there would have been a specific lien. *Johnson v. Boyfield*, Vol. I. 314.

4. Covenant to set apart and pay annual profits of land, is in equity a lien on the land against the covenantor and claimants under him, with notice. *Legard v. Hodges*, Vol. I. 477.

5. A. abroad commissions B. in London to send him foreign coin; with particular directions as to the manner and times of sending it; and remits bills, which B. discounts; and the coin required not being to be had in England, sends two remittances, not equal to the amount of A.'s bills, to Lisbon, for the purpose of procuring it; with directions, if it cannot be had, to return bills. The coin not being to be had, bills, nearly to the amount of the remittance to Lisbon, not indorsed by the correspondent there, are returned; and B. in the interval be-

coming bankrupt, are received by his assignees. A. was held to have a lien upon these bills, upon the particular circumstances; the Lord Chancellor expressing much doubt, whether the lien would hold good in the case of a remittance to buy goods in the way of trade. *Ex parte Sayers*, Vol. v. 169.

6. Under the usual condition at an auction, that if the vendee should fail to complete his purchase, the vendor should be at liberty to resell; and the vendee pay the expenses and make good the deficiency, &c. *Ex parte Hunter*, Vol. vi. 94.

7. No lien under the circumstances. *Adams v. Claxton*, Vol. vi. 226. And *Ex parte Smith*, Vol. vi. 447.

8. Vendor's equitable lien upon the estate for the purchase-money lost by taking a special security by way of a pledge of stock. Whether every security would have that effect, *Quære*. *Nairn v. Prowse*, Vol. vi. 752.

9. Whether the vendor's lien could prevail against an equitable mortgage by deposit of deeds, *Quære*. *Nairn v. Prowse*, Vol. vi. 752.

10. Distinction between a judgment, as attaching upon the land, and a special agreement for a security upon the land. *Mackreth v. Symmons*, Vol. xv. 354.

11. Bill following life insurances, effected by the plaintiff's clerk, with the plaintiff's money, procured by embezzlement, and transferred to the defendants for valuable consideration, but with notice. Demurrer allowed, the transaction amounting to felony by the statute 39 Geo. 3. c. 85; and therefore not raising a civil contract; secondly, the policies not being the plaintiff's property. *Cox v. Paxton*, Vol. xvii. 329.

12. Solicitor's lien on papers superseded by taking security. *Cowell v. Simpson*, Vol. xvi. 275.

Vendor's lien for the purchase-money; lien upon goods in different trades, for work done upon them, for the general balance; and as to the effect of taking security. *Ibid.*

Factor's lien, both for his expenditure on the goods in his possession, and his general balance, lost by a special contract for a particular mode of payment. So, in various trades. *Ibid.*

13. Solicitor's lien in bankruptcy; as in a cause, upon the debt and costs; viz. the clear result of the equity between the parties.

Distinction between the practice of the courts of law; the Common Pleas upon the same principle not allowing the lien to interfere with a right of set-off, &c.; the King's Bench holding the lien paramount to any claim of the party. *Ex parte Castle*, Vol. xv. 539.

14. Upon an act of bankruptcy by lying two months in prison, joint and separate commissions issued; the former being established, the latter superseded, the attorney employed by the bankrupt and in sustaining the latter against the former has no lien upon the papers delivered to him by the bankrupt after the arrest: upon petition of the joint creditors he was ordered to deliver them up. *Ex parte Lee*, Vol. II. 285.

15. On a bankruptcy by lying two months in prison no possible lien can be acquired after the first arrest. *Ibid.* 286.

16. Lien of the agent in town upon the papers in his hands for what is due to him, as agent in the cause, from the solicitor in the country. *Ex parte Sterling*, Vol. xvi. 164.

17. Attorney's lien generally on papers in his possession: not limited to the occasion on which they were delivered without special agreement. *Ibid.*

18. No lien on the proceedings

under a commission of bankruptcy for the fees of enrolment. *Ex parte Sanderson*, Vol. xix. 161.

19. No lien on a ship abroad can be created by parol, nor by bills of exchange drawn by the master; unless upon mistake, clearly established, the instrument can be corrected; as in the case of a joint bond, intended to be joint and several. *Ex parte Halket*, Vol. xix. 474.

20. Lien on a ship abroad by bill of sale. *Ibid.* 475.

And see ATTORNEY, [B.]

LIMITATION.

And see DEVISE, *passim*.—ISSUE, 5.

—PERPETUITY, *passim*.—TENANCY FOR LIFE, 10.

1. Interest of residue of persons given to A. for life, then the residue to her nieces; if they die without issue, over; the last limitation is too remote, and on death of A. the niece take the whole. *Everest v. Gall*, Vol. I. 286.

2. In a will the words "heir male" may be *nomen collectivum*, to effectuate the general intention to include all the issue. *Bayley v. Morris*, Vol. IV. 794.

3. Bequest of residue of real and personal estates to trustees, for use of testator's brother A. during his life, with remainder over in default of issue, to B. during his life, with like remainders over in default of issue; such remainders held void, as being too remote, and the first taker A. his heir and residuary legatee entitled to the real and personal estate. *Boehm v. Clarke*, Vol. IX. 581.

LIMITATION, STATUTES OF.

1. Whether transactions between

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principal and agent are within the exception in the statute of limitations, as to merchants' accounts, *Quære. Jones v. Pengree*, Vol. vi. 580.

2. Whether in order to have the benefit of the exception in the statute of limitations, as to merchants' accounts, some transaction must have passed within six years, *Quære. Ibid.*

3. Upon a plea of the statute of limitations, held that an averment that no cause of action occurred within the last six years, was in substance an averment that the money (for which the bill was filed) was not received within the last six years. *Sutton v. Earl of Scarborough*, Vol. ix. 75.

4. Upon bill filed against executor of plaintiff's debtor, who died in 1792, but probate not taken out until 1802, to which was pleaded the statute of limitations; and plea allowed, it appearing by fair construction of the allegations in the bill, that the defendant had possessed himself of the goods, and might have been sued before probate, as executor *de son tort*. *Webster v. Webster*, Vol. x. 93.

5. *Quære*, Whether a charge by will for payment of debts, &c. will revive a debt barred by the statute of limitations? *Stackhouse v. Barnston*, Vol. x. 453.

Though the statute does not apply to any equitable demand, yet equity adopts it in cases analogous to those to which it applies at law. As in accounts of rents and profits restrained to six years. The statute is no bar to a legal rent charge but nonpayment, and acquiescence for a long period, may raise a presumption of release or extinguishment. *Ibid.*

6. The statute does not apply to equitable charges on real estate,

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although the lapse of time is considerable. If the demand exist in right, it must appear that the parties have either released, or done something equivalent to a release. *Ibid.* 465.

7. Plea of the statute of limitations to a bill of discovery overruled; upon letters, assigning reasons for declining to pay; and recommending the plaintiff to bring an action; as amounting to an acknowledgment of the debt, sufficient to take it out of the statute upon the authorities; though against principle. *Baillie v. Sibbald*, Vol. xv. 185.

8. As to reviving a debt, within the statute of limitations, under a trust for debts, *Quære. Ex parte Dewdney*, Vol. xv. 488.

9. Effect of time in equity by analogy to the statute of limitations. *Ibid.* 496.

10. The effect of the statute of limitations not discontinued by bankruptcy. *Ibid.*

11. As to reviving a debt, within the statute of limitations under a devise for debts, *Quære. Ibid.* 497.

12. Executor not bound to plead the statute of limitations; but after the decree the objection may be taken against other creditors coming in before the Master. *Ibid.* 498.

13. Statute of limitations a bar to merchants' accounts; all accounts having ceased above six years. *Barber v. Barber*, Vol. xviii. 286.

14. Demurrer upon the statute of limitations to a bill for an account, stating that no demand was made for twelve years. *Foster v. Hodgson*, Vol. xix. 180.

15. Whether the allegation, that the parties dealt as merchants, implies that the accounts are merchants' accounts within the statute of limitations, *Quære. Ibid.* 180.

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16. The statute of limitations not given in evidence at law; whether a good defence by demurrer, *Quere. Ibid.* 185.

17. Conflicting opinions formerly on the exception in the statute of limitations as to merchants' accounts, whether barred, if no item within six years (as now decided, *Barber v. Barber, ante*, Vol. xviii. 286), or excepted generally. *Ibid.* 180.

18. The creditor's not the debtor's absence from the country, takes the demand out of the statute of limitations. *Fladong v. Winter*, Vol. xix. 200.

19. Limitation in equity independent of the statute. *Roffey, ex parte*, Vol. xix. 470.

20. The old decisions, that a direction by will to pay debts prevents a plea of the statute of limitations, disapproved.

Distinction between debt on simple contract, the statute admitting the debt, but taking away the remedy, and on bond, the time raising a presumption of payment.

Different pleas to bond and simple contract. *Ibid.* 470.

21. The statute of limitations not applicable to debt, by decree, order, or award. The time while the debtor is in custody, not considered. *Mildred v. Robinson*, Vol. xix. 585.

LONDON, CUSTOM OF.

And see *ADVANCEMENT*, 3.—
DOWER, 5.

The custom of London attaches only on the property the free-man has at his death; but a disposition, not to take effect until after his death, though by an irrevocable instrument, is a fraud upon the custom. *Fortescue v. Hennah*, Vol. xix. 72.

LUNATIC.

LUNATIC.

And see *INFANT*, 32.

1. Committee of lunatic's estate not permitted to pass his accounts, without inquiry, what money was in his hands, from time to time, the Master to state any particular circumstances. *Ex parte Cotton*, Vol. i. 156.

2. Where a brother had managed for nine years before the commission, during which time there had been considerable savings, ordered to pay interest, although it was alleged, that he had made no use of it, unless justified by particular circumstances. *Ex parte Chumley*, Vol. i. 156.

3. Upon bill by son, committee of his father, to set aside a voluntary settlement, defendants moved to let the house, sell the goods, &c. and bring the whole into court; refused, the plaintiff not consenting. A creditor impeaching a settlement for fraud, must put himself in a situation to complain, by getting judgment for his debt, and stating that he is defrauded by the settlement. *Colman v. Croker*, Vol. i. 160.

4. Timber on estate of lunatic, cut under order of Court, sold, and produce paid into the bank on account of the lunatic: after his death, on petition by his heir for the money, Lord Chancellor was of opinion, that the Court may do it for lunatic's benefit, but only on pressing occasions; that when property is converted, equity will recall it for the representative, if done by breach of trust, not if by accident, the Court, or the tort of a stranger; but on account of its consequence and difficulty of reversing order made on petition, refused to give it to either representative without a bill. *Ex parte Bromfield*, Vol. i. 453.

5. Costs to committee of lunatic

refused, because he had not passed his accounts regularly, though no fraud. *Ex parte Clarke*, Vol. i. 296.

6. Lunatic is to have every comfort his situation and fortune will admit of, without any regard to expectants. *Ex parte Chumley*, Vol. i. 296.

7. Waste in the statute providing for lunatics means destruction, not that from which tenant for life impeachable is restrained. *Ex parte Bromfield*, Vol. i. 461.

8. A trustee found a lunatic by the Master's report cannot be ordered to convey under 4 Geo. 2. c. 10. unless a commission of lunacy has issued. *Ex parte Gillam*, Vol. ii. 587.

A party found a lunatic by a competent jurisdiction abroad, may be considered a lunatic here. *Ibid.* 538.

9. There is no equity between the real and personal representatives of a lunatic to have property altered by the Court restored; the produce, therefore, of timber cut and sold by order, on report for his benefit, is personal assets. So being equally volunteers, they must take property in the condition found at the death. *Oxenden v. Lord Compton*, Vol. ii. 69.

10. Under the statute the care of lunatics is committed to some great officer of the Crown, and not necessarily to the Chancellor: the warrant confers no jurisdiction, but only a power of administration; the appeal is to the King in Council. *Ibid.*

11. The statute of lunatics introduces no new right in the Crown; the words "waste and destruction" are to be construed in the ordinary, and not technical sense. *Ibid.* 71.

12. Where timber is part of the general rental of a lunatic's estate, it would be a breach of duty not to manage it in the usual manner. *Ibid.*

13. In managing the estate, the principle is to attend only to the interest of the owner, without any

regard to the succession. The Court may apply personal in payment of debts to any extent, and to take every advantage that tends fairly towards ordinary improvement, but consistently with that interest; alteration of property to be avoided as far as possible, and nothing extraordinary attempted; such as purchasing estates, disposing of interests, engaging in adventures, &c. *Ibid.*

14. Bankruptcy of the committee, a sufficient cause of removal. *Mildmay, Ex parte*, Vol. iii. 2.

15. Stock ordered to be transferred under 26 Geo. 3. c. 90. the trustee being of unsound mind, though no commission had issued; and having actually refused to transfer, the refusal proceeding from mere weakness of mind. *Simms v. Naylor*, Vol. iv. 360.

16. Upon petition praying a reference, as to the state of the plaintiff and her fortune, and directions for her maintenance, the property being too small to bear a commission of lunacy; an order was made, without any reference for payment of the dividends for the two ensuing quarters. *Eyre v. Wake*, Vol. iv. 795.

17. Upon a search of precedents, it was held no objection to the return of an inquisition finding a person lunatic, that it does not state that the lunatic has or has not lucid intervals. *Ex parte Wragg*, Vol. v. 450.

A traverse to the return to an inquisition finding a person lunatic is a right by law; though the Lord Chancellor is not dissatisfied with the return upon the evidence. The order was therefore suspended for the purpose of taking the traverse. *Ib.*

Manner of pleading a traverse to an inquisition finding a person lunatic. *Ibid.* 452.

18. The Lord Chancellor cannot,

upon a petition in lunacy, order part of the lunatic's real estate to be sold for payment of his debts, to prevent a bill by the creditors. *Ex parte Smith*, Vol. v. 556.

19. Upon the return of the traverse to the inquisition of lunacy, finding that the party was a lunatic at the time of her marriage and at the time of taking the inquisition, but at that time (the verdict) was not a lunatic, the commission was superseded; but the Lord Chancellor doubted the propriety of such a double issue. *Ex parte Ferne*, Vol. v. 832.

20. No costs to the party taking out a commission of lunacy, which is traversed with success, however meritorious the case: the property never coming to the possession of the crown, there is no fund. *Ibid.*

21. Traverse to an inquisition, finding a person lunatic, is *de jure*, not matter of favour. *Ibid.* 833.

22. Access to a lunatic by a person entitled upon the death of the lunatic in default of appointment by her, to see whether she was in a state to exercise the power, refused. *Ex parte Lyttleton*, Vol. vi. 7.

23. A liberal application of the property of a lunatic is to be made, to secure every comfort his situation will admit. *Ex parte Baker*, Vol. vi. 8.

24. The Court will not appoint a Master in Chancery to an office, in respect of which he will be liable to account; as, committee of a lunatic's estate. The Court refused to appoint a person committee of a lunatic, upon the circumstances: particularly, that he had agreed to give part of the profits to another. *Ex parte Fletcher*, Vol. vi. 427.

25. Agreement by the committee of a lunatic, that coal under the lunatic's estate should be worked by the owner of the adjoining land, established under the circum-

stances. *Ex parte Tabbert*, Vol. vi. 428.

26. Any fair and reasonably provident application as to the execution of a commission of lunacy is not discouraged; but in this instance the petition being wholly groundless was dismissed with costs. *Ex parte Ward*, Vol. vi. 579.

27. Whether a mere stranger having no interest would be permitted to traverse an inquisition of lunacy, *Quære. Ibid.*

28. Right to traverse an inquisition of lunacy under the statute 2 Edw. 6. c. 8. § 6. *Ibid.* 580.

29. Commissioners of lunatics have a power of summoning witnesses as incident to their office. *Ex parte Lund*, Vol. vi. 784.

30. A person, having an interest under a contract with the lunatic, permitted to traverse. *Ex parte Hall*, Vol. vii. 261.

31. The Lord Chancellor inclined to quash the inquisition; the commission not having been executed near the place of abode, and an order that the lunatic should have due notice having been disobeyed. *Ibid.*

32. The old rule, that the next of kin of a lunatic, if entitled to his estate upon his death, was not to be committee of the person, is not now adhered to. *Ex parte Cockayne*, Vol. vii. 591.

33. The commission of lunacy is not confined to strict insanity; but is applied to cases of imbecility of mind, to the extent of incapacity from any cause, as disease, age, or habitual intoxication. *Ridgway v. Darwin*, Vol. viii. 65.

34. The Lord Chancellor cannot by an order in lunacy make an absolute title to the lunatic's leasehold estate. *Ex parte Dikes*, Vol. viii. 79.

35. The Lord Chancellor will not,

even for creditors, make an order in lunacy, the effect of which must be to put the lunatic in a state of absolute want. *Ibid.*

36. A lunatic abroad under a judicial proceeding in nature of a commission of lunacy is not within the statute 36 Geo. 3. c. 90. *Sylva v. Da Costa*, Vol. viii. 316.

37. Where the finding of the jury was only as to the time of the inquisition, and not the time of the contract, and the defendant was not shown to have acted *mala fide*, or with notice, and the consequences would be very extensive and inconvenient, and the parties could not be reinstated, the Court refused to interfere to set aside the contract entered into by the lunatic. *Niell v. Morley*, Vol. ix. 478.

38. Upon bill for specific performance of a contract for the sale of an estate, value to be set by third persons, and by a commission the defendant was found to have been lunatic long prior, but plaintiff had not traversed the inquisition: Court directed an issue, whether the defendant was a lunatic at the time of the execution of the contract; and if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval? *Hall v. Warren*, Vol. ix. 605.

39. If general lunacy is once established, the party alleging a lucid interval will be under the necessity of showing that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind, sufficient to enable the party soundly to judge of the act. *Ibid.* 611.

40. All acts done by a lunatic during a lucid interval are to be considered done by a person capable of contracting, managing, and

disposing of his affairs at that period. *Ibid.* 610.

41. No allowance to a committee for care and trouble. *Anon.* Vol. x. 103. Nor for repairs to the lunatic's order without a previous order. *Anon.* Vol. x. 104.

42. When no one can be procured to act as committee, a receiver appointed with a salary, to give such security as a committee does to the satisfaction of the Attorney General. *Ex parte Warren*, Vol. x. 622.

43. To supersede a commission it is not necessary that the party should be restored to as perfect a state of mind as before; but when there is a tendency to violence, from the effect of any disease, the Court ought to be satisfied, by the evidence of persons having competent knowledge of the subject, that there is an absence of that disease, founded upon the whole nature of the case and former proceedings. When the lunacy had been established by two verdicts, and the affidavits of the medical men as to the recovery did not come with such exposition of the whole case, and conclusions founded thereon, an issue was directed. *Ex parte Holyland*, Vol. xi. 10.

44. Expenditure by the committee of a lunatic without a previous application in future shall never be allowed. *Ex parte Marton*, Vol. ix. 397. *S. P. Ex parte Hilbert*, *Ibid.*

45. Where the return to a commission was insufficient, as not distinctly finding the fact of incapacity, Court directed a new commission: in such cases a *melius inquirendum* never issues. The jury should find either in the words of the commission, or in equipollent words; and the party himself should be present at the execution of the commission. A *habeas corpus* not necessary, but

only an order to deliver up the person of the lunatic upon the party in whose custody he may be. *Ex parte Cranmer*, Vol. xii. 445.

46. Orders in lunacy made after the death of the lunatic; but the claim of petitioner, as attorney, upon a retainer over-reached by the lunacy as found under the commission, directed to be established at law. *Ex parte M'Dougal*, Vol. xii. 384.

47. Court has jurisdiction in lunacy over committee guilty of a contempt in printing and publishing a libellous pamphlet dedicated to the Chancellor, and reflecting upon the conduct of the petitioner, acting in the management of the affairs of the lunatic, under orders, and in pursuance of the trust of a will. Printer not excused by ignorance of the contents. *Ex parte Jones*, Vol. xiii. 237.

48. A commission of lunacy will not protect the lunatic against an action; and a commission of bankrupt is a species of action against which the lunacy cannot be a defence. *Anon.* Vol. xiii. 590.

49. Commission of lunacy in a proper case granted upon the application of a stranger, and without regard to his motive, the lunatic being a natural child, and his mother opposing it. *Ogle, ex parte*, Vol. xv. 112.

50. The Court will not make an order for payment of the debts of a lunatic, unless it be shown that it is for his accommodation, and clearly that he has a sufficient maintenance. *Ex parte Hastings*, Vol. xiv. 182.

51. In the appointment of committee of a lunatic, relations, unless some specific objection, preferred to strangers. The wife appointed committee of the person, not alone, but jointly with a relation. *Ex parte Le Heup*, Vol. xviii. 221.

52. Residue of a lunatic's property beyond his debts invested in a government annuity for his maintenance, upon the Master's report that it was for his benefit. *Ex parte Stonard*, Vol. xviii. 285.

53. Land-tax on a lunatic's estate redeemed by order out of the produce of decaying timber ordered to be cut for payment of debts under the Master's report, that it was for his benefit. No equity for a charge in favour of the next of kin. *Ex parte Philips*, Vol. xix. 118.

54. Distinction in lunacy. The Lord Chancellor, acting under a special commission, does what is for the lunatic's benefit; taking the advice and assistance of the presumptive representatives in managing the property; thus cutting timber, or selling real estate to pay debts, &c.; not regarding the different forms of disposition; the power over each species of property upon a lucid interval being the same. *Ibid.* 123.

55. Timber on a lunatic's estate *ex parte paternâ* cut; and applied in discharge of a mortgage on his estate *ex parte maternâ*: no equity between the heirs. *Ibid.*

56. Distinction between the jurisdiction of the Court of Chancery and that in lunacy, under a special warrant from the crown, usually intrusted to the Keeper of the Great Seal. *Sherwood v. Sanderson*, Vol. xix. 280.

57. Traverse of verdict of unsound mind under a commission, being the right of the party, cannot be refused; and prevents the Crown's taking the custody, and consequently allowing the costs of the proceedings, however meritorious: but they were given out of a fund of the lunatic's, in Court, in a cause, on the principle on which the Court protects persons in a state of inca-

capacity, though adult, and not objects of a commission; assigning guardians, &c. The costs of the traverse also, though not of course, allowed: the lunatic having been permitted herself to traverse after a personal examination. *Ibid.*

58. The Keeper of the Great Seal usually the person to whom the care of lunatics is intrusted. *Ibid.* 283.

59. The private examination for the purpose of a traverse of a verdict of lunacy under a commission, is merely to ascertain the wish of the party to exercise the right of traverse. *Ibid.* 284.

60. Jurisdiction in lunacy distinct from the Court of Chancery; though usually in the Keeper of the Great Seal, under a special warrant of the Crown. *Ibid.* 285.

61. Verdict of unsound mind equivalent to idiocy or lunacy: but mere incapacity to manage his affairs will not alone support the commission. *Ibid.*

62. Incapacity to comprehend the most simple proposition of figures evidence of unsound mind: to be estimated with reference to age, situation, &c. *Ibid.* 286.

63. Right of alienage of lunatic to traverse. *Ibid.* 287.

64. Commission of lunacy uniformly executed at the residence of the party; for that purpose his mansion-house; if none, his last place of abode. No instance of exception, where he was within the realm. Convenience of witnesses, &c. no ground for exception. Most improper to bring him into Middlesex for the purpose of executing the commission there. *Ex parte Baker*, Vol. XIX. 340.

65. As to the jurisdiction, after a commission of lunacy has issued, to make any alteration as to the place of execution, *Quære*. *Ibid.*

66. In lunacy the old writ to the sheriff did not require a view of the party; as the writ to the escheator did as to an idiot. *Ibid.* 341.

67. Will of a resident in a receptacle for lunatics established upon the then state of his mind, compared with antecedent declarations. Distinction, if not then competent. *Bootle v. Blundell*, Vol. XIX. 508.

68. On the accidental loss of a commission of lunacy, after inquisition found, order for a duplicate commission, and the inquisition, which was recovered, to be annexed to it. *Ex parte Raine*, Vol. XIX. 589.

69. To prevent a commission in a case of weak mind and small property, order, that though no proof of a debt should be made by the party or a committee, the Master shall be at liberty to receive any proof, satisfactory to him, by analogy to the practice of taking the answer of a person of weak mind by guardian. *Herbert v. Matthews*, Vol. XIX. 611.

LIS PENDENS.

See MORTGAGE, 19.—NOTICE.

MAINTENANCE AND CHAMPERTY.

Maintenance and Champerty. *Ward v. Downes*, Vol. XVIII. 125.

MAINTENANCE.

And see BARON AND FEME, [F.]—PORTIONS, 3, 4.

1. The Court will not supply a surrender for a natural child; but, if it has a legacy from the father payable at 21, will allow mainte-

nance. *Crickett v. Dolby*, Vol. III. 12.

2. Testator gave his wife 400*l.* a year in addition to 500*l.* a year under her settlement, in consideration of the expense and care she would incur in the maintenance of their children: she must maintain them, when at home; but is not to be charged with education, or maintenance at school. *Collier v. Collier*, Vol. III. 33.

3. Upon the ground of an express maintenance and other indications of the intention, the Lord Chancellor inclined to the opinion, that the rule for interest upon a legacy given by a parent to a child, till the time of payment, was not applicable: but the bill of the children was dismissed upon circumstances of acquiescence, laches, and the consequent difficulty of taking the accounts. *Mitchell v. Bower*, Vol. III. 283.

4. Bill for discovery, whether the plaintiffs were not employed by one defendant, a peer, as solicitors, to present and prosecute a petition on behalf of the other defendant, complaining of a return of a member of parliament, and praying that he might be declared duly elected: demurrer allowed on grounds of public policy, and because the discovery could have no effect, and principally, because such transaction would amount to maintenance at common law. *Wallis v. the Duke of Portland*, Vol. III. 494.

5. Maintenance justifiable from the privity of the parties in estate, or their connexion as master and servant. *Ibid.* 503.

6. Testator directed his children generally to be maintained during the life of his wife, but distributed the property after her death in words, which would not comprise after-born sons: they were held en-

titled to the former provision. *Matchwick v. Cock*, Vol. III. 609.

7. Trust by will for all the children of A. when and as they shall severally attain sixteen; with direction for maintenance: those born after the eldest attained sixteen were excluded: maintenance was directed without regard to the father's ability. *Hoste v. Pratt*, Vol. III. 730.

8. Devise to an infant grandson at twenty-one, with accumulation in the mean time; with similar limitations in case of his death under twenty-one to his sisters. Their father being dead, having left all his property, which was considerable, to his wife, who married a person in low circumstances, maintenance was decreed, without an inquiry whether it was for the benefit of the infants; the Court judging of that. *Greenwell v. Greenwell*, Vol. v. 194.

9. Residuary bequest to a very large amount in favour of infant grand-children, payable at twenty-one or marriage, with survivorship; the interest to accumulate, and be paid with the capital; and in case of the death of all before the time of payment over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and there being several children, the Court directed maintenance, taking the consent of the mother. *Cavendish v. Mercer*, Vol. v. 195.

10. Residuary bequest in favour of infant grand children, payable at twenty-one or marriage, or to the issue of those dead, with survivorship, and accumulation till the time of payment, and a limitation over absolutely in case of the death of all without issue before that time. The father, in consequence of bankruptcy, being wholly unable to main-

tain his children, maintenance was directed by the Court, taking the consent of the persons to whom the property was given over. *Fendall v. Nash* Vol. v. 197. (Note.)

11. Irregular to confirm reports as to maintenance on motion. *Ibid.* 199.

12. A direction by will to apply so much interest as might be necessary towards the maintenance and education of the testator's grandchildren upon the decease of their respective mothers, the residue to accumulate for them all, was confined to so much as should be actually necessary, regard being had to their situation at the death of their mother; their father having by his will left them a considerable property, with a provision for maintenance. *Rowlins v. Goldfrap*, Vol. v. 440.

13. A large allowance for maintenance and education ordered under circumstances; but with reluctance. *Ex parte Petre*, Vol. vii. 403.

14. Maintenance allowed for the time past. *Reeves v. Brymer*, Vol. vi. 425.

15. The Court very rarely has broken in upon the capital for the mere purpose of maintenance, though frequently for advancement. Vol. vi. 474.

16. Maintenance allowed for the time past as well as the time to come. *Sherwood v. Smith*. Vol. vi. 454.

17. Maintenance decreed for grandchildren out of property left by the grandfather, though no direction in the will. *Collis v. Blackburn*, Vol. ix. 470.

18. Maintenance allowed to children and grandchildren, though their interest depended upon attaining twenty-one, and survivorship and accumulation was directed, and

no express authority for applying the interest to their maintenance, except upon the event of the eldest dying under twenty-one without issue, when the interests of the others would arise; but the Court refused it upon petition, and directed a bill to be filed. *Fairman v. Green*, Vol. x. 45.

19. Where there is any legatee over, the Court always takes the consent of that legatee before it allows maintenance. *Ibid.* 48.

20. Where maintenance was directed for sons until twenty-one, and for daughters until twenty-one or marriage, and a daughter married at eighteen, Court allowed maintenance for the interval, the legacy bearing interest from the time when it was payable. *Chambers v. Goldwin*, Vol. x. 1.

21. Court has allowed maintenance even where no direction as to interest. *Ibid.*

22. Upon a legacy to grandchildren when the youngest shall attain twenty-one, maintenance out of the interest refused. *Lomax v. Lomax*, Vol. xi. 48.

23. A legacy to a grandchild with interest payable at twenty-one, with a bequest over on the contingency of dying under that age: held that there being no fund out of which the interest could be given, maintenance could not be allowed, although the father was stated not to be of sufficient ability. *Errington v. Chapman*, Vol. xii. 20.

24. Where the residue was given to five children, with survivorship among them, with a gift over to a sixth in the event of their all dying under twenty-one. The Court refused maintenance, that the property might never belong to any of them. *Ex parte Keble*, Vol. xi. 605.

25. When the Court sees clearly

that there will be a clear fund, it will give the residuary legatee an allowance for maintenance pending the account, but not when he is an accounting party. *Warter v. —* Vol. XIII. 92.

26. Where the legatees, infants, were entitled to the fund absolutely between them, a daughter at twenty-one, and the residue among the sons, with benefit of survivorship, an increase of maintenance, beyond that directed by the will, allowed. *Aynsworth v. Pratchett*, Vol. XIII. 321.

27. When the Court sees that it is clearly for the benefit of the infants, the chance of surviving being equal, and can procure the consent of all persons interested, the Court will direct maintenance against the express direction of the will for accumulation. But it will not give it where, in any event, under the operation of the will, the interest may belong to other persons. *Errat v. Barlow*, Vol. XIV. 203.

28. Where it was the intention of the testator not to entrust the father and mother with the power of applying the dividend to maintenance, but the trustees were to exercise a discretion, subject to the approbation of the parents, and no trustees had ever been appointed, the Court directed a reference to the Master, to inquire whether it would have been reasonable and proper for trustees to have allowed any and what part of the dividends to be so applied, upon the particular circumstances of the will. *Maberly v. Turton*, Vol. XIV. 499.

29. No interest given upon arrears of maintenance. *Mellish v. Mellish*, Vol. XIV. 516.

30. The interest of small legacies ordered to be paid to the mother for maintenance, upon her affidavit that the father was abroad in embarrassed

MARRIAGE.

circumstances. *Walker v. Shore*, Vol. XV. 122.

31. A direction for maintenance in general terms, comprehending all children, not restrained by the bequest of the capital, in terms limited to those living at the date of the will. *Freemantle v. Taylor*, Vol. XV. 363.

MARKET.

On complaint of an old market against a new one, set up near it it is essential that the old is competent to the accommodation of the public; so in case of patent right to a theatre, where the accommodation of the public being the principal thing. *Ex parte O'Reilly*, Vol. I. 114.

MARRIAGE.

And see *BARON AND FEME* [E.] 22.

— *BOND*, 12 — *FORFEITURE*, 1.

— *INFANT* [A.] 4, 5. 32.—(c) 13.

1. A woman, pending a treaty of marriage with A. settled all her property to her separate use, with his approbation: a few days after B. by a stratagem, induced her to marry him, but had no notice of the settlement. The Court established the deed of settlement, and set aside a deed of revocation obtained by duress. *Countess of Strathmore v. Bowes*, Vol. I. 22.

2. Condition in restraint of marriage under twenty-one, without consent of trustees, established both as to a rent-charge out of real estate and a personal legacy. *Stackpole v. Beaumont*, Vol. III. 89.

3. Ground of the favour to marriage by the civil law. *Ibid.* 96.

4. Condition by will, requiring consent of trustees to marriage, not applicable to the second marriage of a daughter, who had married between the date of the will and the death of the testator, and was a widow at his death. *Crommelin v. Crommelin*, Vol. III. 227.

5. The Spiritual Court has exclusive cognizance of the rights and duties arising from the state of marriage: a court of equity, therefore, has no jurisdiction upon a contract for separation between husband and wife simply; much less where it will affect a purchaser or creditor; but the jurisdiction holds in special cases; as where a third party covenants to indemnify the husband against the wife's debts; or a fortune accrues to the wife after separation; or the property is the subject of a trust. *Legard v. Johnson*, Vol. III. 352.

6. By the canon law, which is binding on the clergy, it is highly criminal to celebrate marriage without a due publication of banns, which must suppose information as to the residence. Penalties by that law and the statute law upon the clergyman. *Priestly v. Lamb*, Vol. VI. 423.

7. Action at law will lie upon a parol promise, upon mutual promises of marriage. *Cock v. Richards*, Vol. X. 438.

8. Consideration of marriage considered as extending to persons not directly within it; viz. to brothers, uncles, and other relations, upon the marriage of a son; as within the contract between him and his father. *Pulvertoft v. Pulvertoft*, Vol. XVIII. 92.

9. Marriage by banns legal, though only one of the parties resided in the parish. *Robinson v. Grant*, Vol. XVIIII. 289.

10. Real and personal estate given by will on marriage with consent and approbation, with a limitation over in case the devisee should marry without the full consent, &c. of the trustees, &c. or refuse to execute such settlement as they should think proper.

Previous consent and settlement not dispensed with, though under favourable circumstances: the treaty with consent of the two acting trustees, preparing the settlement avowedly on behalf of all, without authority, but with slight knowledge and no dissent of the third; who had not acted, except proving the will, and a few other instances; and execution deferred only from collateral circumstances; viz. a debt claimed by the two acting trustees. *Clarke v. Parker*, Vol. XIX. 1.

11. Dangerous jurisdiction upon consent to marriage, whether given or reasonably withheld. The individual, meaning to act honestly, may have reasons, which he may refuse to disclose. *Ibid.* 11.

12. Instances of implied consent to marriage by not expressing dissent, and no good reasons suggested; and of relief against withholding consent from a corrupt motive; consent in writing not being required. *Ibid.* 11.

13. Consent to marriage may be withdrawn upon good reason. *Ibid.* 13.

14. Distinctions upon consent to marriage in equity and at law; as a condition precedent, subsequent, and *in terrorem*; with reference to the civil law as to personal legacies; as to real and personal estate; the effect of a devise over, and a residuary devise, as such, on breach of the condition. *Ibid.* 13.

15. The opinion attributed to Chief Baron Comyns (1 Atk. 375),
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that the consent of the majority of the trustees is sufficient, spurious. That was never held sufficient without more; as where one withholds his consent for a vicious or unreasonable cause. *Ibid.* 15.

16. Validity of condition for consent of strangers or their representatives to marriage. *Ibid.* 15.

17. No instance, that, consent of three trustees to marriage being required, that of two, not consulting the third, would be sufficient. *Ibid.* 17.

18. Jurisdiction upon the refusal of a trustee to consent to marriage from a vicious, corrupt, or unreasonable cause, as a fraud. *Ibid.* 18.

19. Observations on the case of *Long v. Dennis* (4 Bur. 2052), as going too far against conditions for consent to marriage. The account there of *Burlton v. Humphris* (Amb. 256.) corrected. *Ibid.* 19.

20. Condition for marriage with consent and approbation, with a limitation over on marriage without such consent or approbation; Lord Hardwicke's opinion, holding approbation eleven months after marriage sufficient, denied by Lord Thurlow. *Ibid.* 21.

21. Trustee for consent to marriage not required to show his reason for dissent. It must be shown that he has unreasonably refused assent. *Ibid.* 22.

22. Portion by will on marriage with consent of the executors, or the major part of them, their or his executors, &c.

23. One of two survivors consenting, and the other declining to interfere, inquiry directed, whether the intended marriage was suitable; and if so, a proposal for a settlement to be received. *Goldsmid v. Goldsmid*, Vol. XIX. 368.

MARRIAGE BROCCAGE.

Decree to refund money obtained by sale of influence in marriage broccage. *Osborne v. Williams*, Vol. XVIII. 382.

MARRIAGE ARTICLES.

And see AGREEMENT, [A.] 1.—[B. 1, 2.—BARON AND FEME, [D.]

1. Agreement, on marriage, to settle stock and other property on the wife to the use of the husband, husband having by fraud made her transfer the stock to him, decreed, upon bill for performance, to transfer the stock, and assign the rest, under the direction of the Master, to trustees for her use, who should receive the dividends due, and to become due, until the transfer and assignment, and to pay costs on account of the fraud. *Lampert v. Lampert*, Vol. I. 21.

2. Personal under marriage articles to be invested in land, or government, or other securities: the Court finding it in its original state considers it as personal; but part having been laid out in land, which was settled, and afterwards sold, and the produce invested in stock, till a proper purchase of land could be found to be settled to the same uses, was considered as land. *Bristow v. Warde*, Vol. II. 336.

3. Articles before marriage to settle were so expressed, that the husband would have had an estate tail: settlement, copying the very words of the articles, reformed. *Randall v. Willis*, Vol. V. 275.

4. Articles to settle estates of husband and wife, of equal value in strict settlement, and providing portions: the wife's estate being with-

drawn by decree on the ground of in fancy, the younger children were confined, as against the eldest, to half the portion; the articles providing, in the event of no issue male, that the estates should separate, and each bear a moiety; though they also contemplated the case of the wife's refusal to be bound; providing against it by the forfeiture of her interest. *Clough v. Clough*, Vol. v. 710.

5. Articles before marriage for settling real estates of the husband, and also all and singular his personal estate, of what nature or kind soever: a proper execution would be by a covenant, that real estate, that should be purchased with the personal, should, with respect to the objects of the settlement, be considered personal: the settlement, therefore, made after marriage, containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband, according to the evidence, in order to defeat the right of his wife, were decreed to be conveyed by his devise according to the articles. A gift by him in his life, in consideration of service, was not disputed; but under the particular circumstances attending the marriage, and in the case of an infant, the Court appeared to question its validity. *Randall v. Willis*, Vol. v. 262.

6. The rule, that a limitation to the heirs of the body in articles, shall be carried into execution by a strict settlement, does not prevail where the concurrence of both parents would be necessary to bar the entail. *Nannock v. Horton*, Vol. vii. 390.

MARRIAGE SETTLEMENT.

CONSTRUCTION AND EFFECT.

And see *BARON AND FEME* [A.] 8.
—[B.] 9.—*COVENANT*, 2. 8. 12.
14.—*SETTLEMENT*, *passim*.—*WARD OF COURT*, *passim*.

1. Marriage settlement not altered in favour of intention, the recital being too general, and nothing *dehors* the words to do it by; but *semble*, it might be done, if there were any thing in the recital by which to correct. *Doran v. Ross*, Vol. i. 57.

2. Where the members of a society covenanted mutually that their widows should receive annuities from the society, payment by that society held not a satisfaction of a covenant by the husband in the settlement to pay her an annuity in lieu of all claim on his personalty. *Rhodes v. Rhodes*, Vol. i. 96.

3. Trust fund, which had been lent under a power in the settlement, decreed to be paid into Court, the trustees representing it to be in danger. *Payne v. Collier*, Vol. i. 170.

4. Reformed in favour of the younger children against the heir of the mother, claiming the reversion, by a letter from her on the marriage of her daughter, stating the intention. *Barstow v. Kilvington*, Vol. v. 593.

5. After marriage reformed in favour of the issue against the devisee of the husband, claiming under the reversion, by his letter of instructions for drawing the settlement; but this equity did not prevail against creditors. *Jenkins v. Quinchant*, Vol. v. 596, *note*.

6. To such uses as the husband and wife shall jointly appoint, and

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in default of such appointment, to them for life; and after the decease of the survivor, to the use of all or any of the child or children of them, in such shares and proportions, and for such estate and estates, term or terms, and payable at such time or times, and in such manner and form, as the husband should by deed or will appoint; and in default thereof, to him and his heirs. The event upon which the last limitation depends, is default of appointment, not of children. *Ibid.*

7. Trust term by will, to raise out of real estate portions for daughters, to be paid on marriage, upon condition that they should be married with consent of their mother, or, after her death, of the trustees, and that the husband should previously make a settlement, the residue of the personal estate, subject to debts and legacies, to be applied in discharging the portions in ease of the real estate, or for any purpose the trustees might judge most beneficial for the devisee. A marriage having taken place with the consent of the mother and the privity of the trustee, but without any settlement, by the neglect of the trustee, the husband having before and after the marriage offered all that was required of him, and been ready to execute a settlement within the condition, relief was given upon those circumstances by raising the portion upon executing the settlement. *O'Callaghan v. Cooper*, Vol. v. 117.

8. The expression "without being married," in a will, construed according to the common acceptance, "without having ever been married." *Bell v. Phyn*, Vol. vii. 458.

9. Money under a settlement, absolutely directed to be laid out in land, and settled with particular limitations, considered as land be-

MARRIAGE SETTLEMENT.

tween representatives, notwithstanding a subsequent clause directing the trustees to lay out the money, with all convenient speed, after request made by the husband and wife, or survivor, and it appeared that no request was ever made; all the provisions and limitations treating it only as land and not a contingent money fund. *Thornton v. Hawley*, Vol. x. 129.

10. A settlement after marriage is fraudulent only against such creditors as were so at the time. *Kidney v. Coussmaker*, Vol. xii. 155.

11. Upon a covenant in a marriage settlement, that the executors of the husband should, within six months after his decease, pay to the wife, if surviving, her fortune, with fifty per cent. in addition, and so of any other sum which he should receive, to which she was entitled in reversion under a will, held, upon his becoming bankrupt, that he claim to the reversionary fund was only contingent, and was as much included in the settlement as if actually transferred, and could not avail against a purchaser of such interest, under the commission. *Ba-sevi v. Serra*, Vol. xiv. 313.

12. After the decree for a settlement obtained by the children, held that they were also entitled to the benefit of the original decree upon the bill of the mother; the same directions, for taking the necessary accounts, &c. by way of original decree upon their own bill, though not in point of form. *Murray v. Lord Elibank*, Vol. xiv. 496.

13. Effect of a contract, on marriage, by bond to devise, convey, or assure all such goods, personal estate, and effects, that the husband should, at any time during the joint lives of him and his wife, be possessed of, to the use of them and

the survivor; attaching on capital, not income; unless laid up as capital; admitting, therefore, expenditure and debts in a fair application of income, not liable to a minute account. On that principle an estate, purchased by the husband with money, partly his own, partly borrowed on his personal security, and some paid off by him, was after his death held to belong not to the trust but to the heir, charged for the benefit of the trust with the money that was his own, the debts paid on account of that purchase, and expenditure in repairs, improvements, &c. *Lewis v. Madocks*, Vol. xvii. 48.

14. Settlement sustained by the consideration of marriage against creditors, notwithstanding false recitals that the property was the wife's: protecting also voluntary expenditure by the husband after the marriage in improvement, by building on enfranchising copyholds; but not jewels and furniture purchased by him after the marriage and given to her. *Campion v. Cotton*, Vol. xvii. 263.

15. The consideration of marriage will support a settlement, even of moveable effects; and neither the joint possession of furniture, nor the want of an inventory, nor the fact that the settler was indebted at the time, and that his wife knew it, will affect the settlement. *Ibid.* 271.

MEMBER OF PARLIAMENT.

Member of parliament refusing to enter an appearance, the Court appointed a clerk in court to enter an appearance for him under statute 45 Geo. 3. c. 124. § 3. *Reed v. Philips*, Vol. xvi. 436.

MERCHANTS' ACCOUNTS.

And see LIMITATIONS, STATUTE OF, 1. 2. 13. 15. 17.

MERGER.

1. At law and in equity, where there is a confusion of rights, there is an immediate merger: that is prevented in equity by the intention, either express or implied; as in the case of an infant entitled to an estate and also to a charge upon it; the rights remain distinct, because more beneficial. *Lord Compton v. Oxenden*, Vol. ii. 264.

2. Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges; therefore where the former descends *ex parte paternâ*, the latter *ex parte maternâ*, upon their union, the paternal heir has no equity. *Selby v. Alston*, Vol. iii. 339.

3. If tenant for life, paying off an incumbrance, in that transaction merges the security by taking an assignment, connecting it with the legal estate of inheritance, upon that transaction, *primâ facie*, there is no charge. In the case of tenant in tail, as he represents the inheritance, the presumption is, that whether he takes an assignment or not the debt is gone, unless there is evidence of an intention to continue it a charge. *St. Paul v. Lord Dudley and Ward*, Vol. xv. 173.

4. Mortgage not merged by union with the fee: the actual intention, not established by the acts of the party, presumed from the greater advantage against merger in favour of the personal representative. *Forbes v. Moffatt*, Vol. xviii. 384.

5. A person becoming entitled to an estate, subject to a charge for his own benefit, may keep up the charge.

248 MISREPRESENTATION.

Distinction upon this subject in law and equity: the latter sometimes holding a charge extinguished, where it would subsist at law; and sometimes preserving it, where at law it would be merged; depending on the intention, actual or presumed, of the person in whom the interests are united. Where, as in most instances, it is, with reference to the party himself, of no sort of use to have a charge on his own estate, it will sink without some act by him to keep it on foot. *Ibid.* 390.

6. Owner of a charge is not, as a condition of keeping it up, called on to repudiate the estate. His election is not to take the charge or the estate, but whether, taking the estate, he means the charge to sink, or continue distinct. *Forbes v. Moffatt*, Vol. xviii. 391.

7. In all cases of a charge merging it was perfectly indifferent to the party, in whom the interests had united, whether the charge should, or should not, subsist. *Ibid.* 395.

MESNE PROFITS.

Whether action for mesne profits can be maintained before judgment in ejectment, *Quære. Pulteney v. Warren*, Vol. vi. 91.

MINES.

See ACCOUNT, 13.—INJUNCTION, 16, 17. 25, &c.

MISREPRESENTATION.

See FRAUD, *passim*.

Whether a party acting upon the faith of a representation, not to him, or with a view to deceive him, but to a third person, would be entitled

MONEY—AS LAND.

to relief against the person making it, *Quære. Denton v. Davies*, Vol. xviii. 504.

MISTAKE.

And *see* LEGACY, [O].—SPECIFIC PERFORMANCE, [B.] 7. 11.

1. Executor having, under a mistake of conception of a will at the trial of issue upon a debt, entered into improper compromise with the creditor, expressly subject to the probate of the Court, was permitted to try the issue, paying costs. *Legh v. Holloway*, Vol. v. 213.

2. Society for raising an annuity fund for the members; the rate of subscription being too low, though the subsisting fund was equal to the annuities then payable, and no adequate remedy by the articles, inquiries were directed: first, to ascertain the state of the society, the defect of the plan, &c.; secondly, to provide a remedy, viz. by additional subscriptions, adequate to the object, by paying the arrears, and providing for the present and future annuities. *Pearce v. Piper*, Vol. xvii. 1.

3. Revocation of an annuity, and substitution of another, notwithstanding a misdescription; no other annuity or instrument appearing. *Benyon v. Benyon*, Vol. xvii. 34.

MONEY—AS LAND.

See DEVISE, 5. 7. 55. 64. 70.—MARRIAGE SETTLEMENT, 11.—SETTLEMENT, 6.

1. The rule that money directed to be laid out in land shall be considered as land, holds only where the quality of land is imperatively fixed

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in the money. *Walker v. Denne*, Vol. II. 184.

2. Under the statute 40 Geo. 3. c. 56. authorising payment of money, to be laid out in land, to be settled, on the tenant in tail, the order was thus qualified; in case he should be living on the second day of the ensuing term; and an inquiry as to incumbrances was directed. *Ex parte Bennet*, Vol. VI. 116.

3. The Court refused upon an *ex parte* petition to order money to be paid under the statute 40 Geo. 3. c. 56.; the subject involving a doubtful question, viz. the construction of a trust of an estate for lives, to permit two sisters to receive the rents for their lives; remainder to the heirs of their bodies; and in case they should die without issue, from and after their decease, over. *Ex parte Sterne*, Vol. VI. 156.

4. No order can be made under Lord Eldon's act, 40 Geo. 3. c. 56. authorising the payment of money, in trust to be laid out in land, to be settled, to the tenant in tail, without a previous inquiry as to incumbrances. *Ex parte Hodges*, Vol. VI. 576.

5. Arising from real estate may pass under the description of personal estate upon the intention. *Roach v. Haynes*, Vol. VIII. 592.

6. Under the statute, enabling tenant in tail of land to be purchased to take the money, the Court takes care that the fund is clear. To obtain the order under that act in term the application must be made in time sufficient to admit of a recovery. *Ex parte Frith*, Vol. VIII. 609.

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And see ASSETS, 17.—CONSIGNMENT, WEST INDIES.—COPY-

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HOLD, 8. 16.—EXECUTION.—INFANT MORTGAGEE.—JURISDICTION, 23.—LACHES, 4.

1. Mortgage may be redeemed after twenty years, when it has been treated during that period as redeemable, as by keeping accounts. *Edsell v. Buchanan*, Vol. II. 84.

2. Mortgage and pledge distinguished. *Jones v. Smith*, Vol. II. 378.

3. Bill against the devisee of mortgaged premises by the heir of mortgagor for discovery and redemption; charging acknowledgments that the estate was held in mortgage, and that accounts had been kept; plea of possession for fifty years under conveyances from the mortgagee, ordered to stand for an answer. *Lake v. Thomas*, Vol. III. 17.

4. A mortgaged estate getting into different hands, redemption was refused as to part from length of time, and opened as to the other part; accounts having been kept, and there being a devise of it as a mortgage. *Ibid.* 22.

5. Mortgagee cannot have an account of rents and profits received by the mortgagor; though the security being upon an estate for lives is become insufficient. *Colman v. Duke of St. Albans*, Vol. III. 25.

6. Estate sold subject to a mortgage was exonerated in favour of the heirs by the personal estate of the purchaser; his acts having clearly made it his personal debt. *Woods v. Huntingford*, Vol. III. 128.

7. Mortgaged estate descends; the mortgagee pressing the security is assigned; a mere covenant by the heir upon that occasion for payment does not make it his personal debt. *Ibid.* 131.

8. So a mere covenant by the purchaser of a mortgaged estate to in-

demnify the vendor does not make it his personal debt. *Ibid.* 131.

9. A trustee laid out the money of different persons on a mortgage, foreclosure by one *cestui que trust* as to his share. *Montgomerie v. the Marquis of Bath*, Vol. 111. 560.

10. Old mortgages held to pass by will as the testator's property. *Attorney General v. Bowyer*, Vol. 111. 714.

11. Agreement for a mortgage a specific lien against creditors. *Burn v. Burn*, Vol. 111. 582.

12. The Court ordered a bill of foreclosure to stand over, to make a judgment creditor, the only incumbrancer not before the Court, a party; but would not adopt as a general rule the usual practice to make all incumbrancers parties. *Bishop of Winchester v. Beavor*, Vol. 111. 314.

13. Assignment of a mortgage without the privity of the mortgagor: the assignee takes subject to the account between the mortgagor and mortgagee. *Matthews v. Wallwyn*, Vol. iv. 118.

14. As between mortgagee and persons claiming under him, without the privity of the mortgagor, they cannot add to what is due, settle the account, or turn interest into principal. *Ibid.* 128.

15. After an assignment of a mortgage, payments to the mortgagee without notice must be allowed by the assignee. The registry, the premises being in Middlesex, is not notice for this purpose. Tender, after the bill filed, of the balance, deducting the payments to the mortgagee with costs, deprived the assignee of subsequent costs. *Williams v. Sorrell*, Vol. iv. 389.

16. Mortgagee may protect himself against the claim of dower by taking an assignment of an old mortgage term prior to the right to dower. *Wynn v. Williams*, Vol. v. 130.

17. A debtor claiming as mortgagee, and by his answer denying notice of the plaintiff's title, which was neither alleged by the bill nor proved, an inquiry for the purpose of affecting him with notice was refused, first upon a petition to vary the minutes, and again upon a rehearing. An inquiry as to what sums he had advanced upon the security of the mortgage, and at what times respectively, was granted. *Hardy v. Reeves*, Vol. v. 426.

18. Under a conveyance of a West India estate, in effect a mortgage, though expressed as a trust, an assignee was held liable to account as a mortgagee, and not entitled to charge as trustee or agent. Therefore the accounts settled with the executors of the mortgagor since his death in 1791, were declared not to be considered settled; the prior accounts to stand; with liberty to surcharge and falsify; but not farther back than 1785. *Chambers v. Goldwin*, Vol. v. 834.

19. Creditors under a deed of trust cannot have a decree for redemption against a mortgagee; unless a special case; as collusion; that the trustee refuses, &c. In this case the bill by the creditors prayed, not a redemption, but a sale; to which the mortgagee would not consent; but submitted to be redeemed; and the bill was dismissed. *Troughton v. Binkes*, Vol. vi. 573.

20. Court allowed the mortgagee the costs of procuring administration to an annuitant under the will of the mortgagor, as a necessary party to the foreclosure, the original mortgagor by parcelling out the equity of redemption having occasioned the necessity. *Hunt v. Townes*, Vol. ix. 70.

21. Where the title reported was a foreclosed mortgage, to which exceptions were taken on the ground

that subsequent mortgagees of the equity of redemption without notice were not before the Court, but disallowed; it appearing that they became such after the bill of foreclosure filed. *Bishop of Winchester v. Paine*, Vol. xi. 194.

22. If a bill filed by a mortgagor for redemption be dismissed, the money not being paid at the time, that operates as a foreclosure, and is equivalent to a decree for foreclosure. *Ibid.*

23. The Court, upon appeal, varied the decree, confining the liberty to surcharge and falsify the accounts of defendant himself (the assignee of mortgagee) without prejudice to any suit against the representatives of the assignee; and, secondly, by confining the declaration against a right to commission to the period only of residence in England, leaving the right whilst in the West Indies open to the Master, though the point was not made in the pleadings. The Court also opened the accounts which had been settled with the executors of the original owner since his death. *Chambers v. Goldwin*, Vol. ix. 254.

24. Accounts settled shall not be set aside but for fraud, or surcharged and falsified but for error; and in the latter case, some specific error must be charged. *Ibid.* 265.

25. If an assignment of a mortgage is taken without the intervention of the mortgagor, whatever assignee pays he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee. *Ibid.*

26. Mortgagee cannot originally covenant for a collateral advantage, as that if interest is not paid at the end of the year it shall be converted into principal, as tending to usury, or that mortgagee shall be receiver with a commission, though he may

stipulate for a receiver to be paid by the mortgagor, and may appoint a bailiff, &c. but he cannot himself stipulate for any advantage beyond the interest. *Ibid.* 271.

27. Where mortgagor was entitled to receive from executors of mortgagee principal and interest of a legacy bequeathed to him by mortgagee; or if the account had been settled in his lifetime to have had such legacy set off against the principal mortgage money and interest then due; his devisee of the equity of redemption could not have the account so taken. *Pettat v. Ellis*, Vol. ix. 563.

28. Mortgagee may have a receiver appointed at the mortgagor's expense, but cannot charge for receiving rents, &c. personally, and when therefore, from the relation of the parties, one an attorney, and the attorney of the other party, acquiescence could not affect the case, liberty was given to surcharge and falsify. *Langstaffe v. Fenwick*, Vol. x. 405.

29. Mortgagee in possession, though not answerable except for fraud, is yet liable for such gross negligence as amounts to wilful default; so he is only to take the fair rents, and is not bound to engage in speculations for the benefit of the mortgagor. *Hughes v. Williams*, Vol. xii. 493.

30. The ground of redemption of a mortgage is, that the only object is a security of the money. *Radcliffe v. Warrington*, Vol. xii. 332. 334.

31. After bill filed and decree of foreclosure, and mortgagee having possession sold the premises, he brought an action for the balance on the bond for which the mortgage had been a security; held that the foreclosure was opened by the action, and that the mortgagee must account for the rents and profits as

if no sale had taken place; but under the circumstances, the demand being inconsiderable and the sale of long standing, a perpetual injunction was decreed. *Perry v. Barker*, Vol. XIII. 198.

In Ireland the course is to decree a sale instead of foreclosure; if the sale produces more than the debt, the surplus goes to the mortgagor, if less the mortgagee has his remedy for the difference. *Ibid.*

32. Upon a mortgage by tenant in fee creating a term, the representative need not be made a party to bill of foreclosure. *Bradshaw v. Outram*, Vol. XIII. 234.

33. Upon sale under a bill by the first mortgagee, the cost to be paid in the first instance. *Kenebel v. Scrafton*, Vol. XIII. 370.

34. Where a purchaser of an equity of redemption enters into a new contract with the mortgagee as to times and modes of payment, it becomes, as between his representatives, his personal debt, otherwise his covenant to pay is only considered an indemnity to the vendor. *Earl of Oxford v. Lady Rodney*, Vol. XIV. 417.

35. An equity of redemption is within the exception in the annuity act, statute 17 Geo. 3. c. 26. § 8. *Tucker v. Thurston*, Vol. XVII. 131.

36. Redemption decreed against the heir of mortgagee and a purchaser, with notice upon acknowledgment of the mortgage within twenty years before the bill in transaction with other persons, not with the heirs of the mortgagor. *Hansard v. Hardy*, Vol. XVIII. 455.

37. Dismissal of a bill for redemption for want of prosecution has not the effect of foreclosure; not preventing another bill. *Ibid.* 460.

38. No order under the statute 7 Geo. 2. c. 20. § 2. the bill not be-

ing confined to a mere foreclosure; but including also another subject. *Bastard v. Clarke*, Vol. VII. 489.

39. Mortgagee having permitted the tenant for life to run in arrears for the interest purchases the estate for life, and takes possession under that purchase: he is bound to apply the surplus rents and profits beyond the current interest in discharge of the arrear; and in the account under a bill of foreclosure was charged accordingly. *Lord Penrhyn v. Hughes*, Vol. V. 99.

40. Mortgagee though entitled to costs in general, deprived of costs occasioned by improper conduct; and even compelled to pay costs. *Detillin v. Gale*, Vol. VII. 583.

41. Of freehold estate with a covenant, for better securing the payment, to procure admission, and to surrender a copyhold estate, and in the mean time to stand seised in trust for the mortgagee. A primary mortgage of both estates; and the freehold not first applicable. *Aldrich v. Cooper*, Vol. VIII. 382.

42. After foreclosure and sale of the mortgaged estate injunction granted to restrain the mortgagee from recovering the difference at law. *Perry v. Barker*, Vol. VIII. 527.

43. Receiver upon a mortgagee in possession; who cannot ascertain the debt due to him. *Codrington v. Parker*, Vol. XVI. 469.

44. A reference under the statute 7 Geo. 2. c. 20. must proceed upon admission of the principal and interest due upon the mortgage; and the Master cannot admit evidence. *Huson v. Hewson*, Vol. IV. 105.

45. The act 7 Geo. 2. c. 20. § 2. giving the effect of a decree of foreclosure by a short order, puts the case exactly in the situation, as if it had been regularly brought to a hearing, it is therefore one of the

intents to give the Court jurisdiction to enlarge the time for payment on the usual terms. *Wakerell v. Delight*, Vol. ix. 36.

46. Mortgagor, a defendant in a bill of foreclosure, being in contempt, is not entitled to claim the relief under the statute 7 Geo. 2. c. 20. for the usual reference. *Hewitt v. Mc Cartney*, Vol. xiii. 560.

47. Foreclosure against an infant. The decree absolute repeats the clause *nisi*, as in the original decree; giving six months after age to show cause; which can only be error. *Williamson v. Gordon*, Vol. xix. 114.

48. Limit of the equity of redemption either upon the statute, or by analogy to it. Cases of exception, infancy, &c., as in ejectment, to be stated in the bill. *Foster v. Hodgson*, Vol. xix. 184.

49. Equitable lien on copyhold estate; by a deposit of the copy of Court roll. *Ex parte Warner*, Vol. xix. 202.

50. The decisions for equitable lien by deposit of title deeds disapproved. *Ibid.* 203.

51. Equity of redemption barred by possession for twenty years, unless circumstances are proved by the mortgagor, showing an acknowledgment of his title by the mortgagee within that period; as accounts delivered by the mortgagee: if by parol evidence, it must be clear and unequivocal. Accounts kept by mortgagee's receiver in a distinct book, and delivered to the mortgagor, but without authority, will not have that effect. *Barron v. Martin*, Vol. xix. 327.

52. As to the effect of accounts kept by the mortgagee in his own books, without any communication on the subject with the mortgagor, to keep the right of redemption open, *Quere. Ibid.* 333.

53. Annual rents not directed in the account, against a mortgagee in possession, from the time when the arrear of interest was discharged by the rents: such direction being, not of course, but under special circumstances, and never for a broken period. *Davis v. May*, Vol. xix. 383.

54. Under a bill of foreclosure by devisee of a mortgagee, the mortgage deed being lost, a reconveyance directed, with an indemnity and costs against plaintiff. *Stokoe v. Robson*, Vol. xix. 385.

55. Construction of several instruments as a mortgagee; though one imported a purchase. *Sevrer v. Greenway*, Vol. xix. 413.

SUBSEQUENT MORTGAGES.— TACKING.

1. Not a general rule in equity, that a second mortgagee, who has the title deeds, without notice of a prior incumbrance, shall be preferred: negligence alone will not postpone the first: it must amount to fraud. *Evans v. Bricknell*, Vol. vi. 183.

2. In equity, a second mortgagee without notice getting in a satisfied term, may protect himself: the conscience being equal. The Lord Chancellor of opinion, that at law an assignment of such term is not to be presumed, without some dealing upon it. Consequences of the late doctrine of courts of law on this subject. *Ibid.* 184.

3. Where a third mortgagee got in the first, subject to a term, and claimed to hold both against the assignees of the mortgagor (become bankrupt subsequent to the last mortgage), and also against the mesne incumbrancer, the debt for the last mortgage being a simple contract debt, the claim, as against the mesne incumbrancer, was

given up, and the fact, whether the last mortgage was prior to the act of bankruptcy, sent to an issue. *Ex parte Knott*, Vol. xi. 609.

4. A subsequent incumbrancer without notice, getting in the deed creating an outstanding term, protected: but *Quere*, As to the situation of the trustee making the assignment. *Ibid.* 613.

5. A creditor by mortgage may tack a subsequent judgment; but a mere judgment creditor, though he may have a lien, cannot tack. *Ibid.* 617.

6. When the legal estate has not been got in by either of two or more incumbrancers, the question must be considered, which of the two has a better right to call for an assignment: from which a court of equity will hold, not only that the first mortgagor shall be protected, but that mortgagee having a better right to call for the assignment, is in equity, in the same state as if he had it. *Ibid.* 618.

The right to tack in equity, is not affected by the relation of the commission to the act of bankruptcy. *Ibid.* 619.

After a decree to settle priorities, you cannot tack; but you may up to the time of the decree. *Ibid.*

7. Upon a bill filed by a second mortgagee to compel trustees to make sale and redeem a prior mortgage, held that the heir of the prior mortgagor must be a party, although interested only in a part of the mortgaged premises, and coming in by a different title. The Court always endeavours to make a complete decree, and determine the rights of all parties interested in the estate. *Palk v. Clinton*, Vol. xii. 48.

8. Trustees having power to raise monies by sale or mortgage, having raised money by mortgage, *Quere*,

If they can afterwards sell in order to pay off that mortgage. It is clear, however, that the mortgagor has only the ordinary remedies of a mortgagee, and cannot call upon the trustees to execute the trust. *Ibid.*

9. First mortgagee leaving title deeds in the hands of the mortgagor not postponed, unless a case of fraud be made out. *Barnett v. Weston*, Vol. xii. 133.

10. Although a prior mortgagee getting in the legal estate, would obtain a preference over all the mesne mortgages, yet the having the legal estate cast upon him as representative will not enable him to unite the equitable and legal estates. *Ibid.*

11. Whether a third mortgagee taking in the first, can exclude the second, where the first, when conveying to the third, knew of the second, *Quere*. *Mackreth v. Symonds*, Vol. xv. 335.

12. First and second mortgagees: the mortgagor a bankrupt. The first mortgagee entitled to tack subsequent judgment, docketed, though no execution had issued at the time of the bankruptcy. *Baker v. Harris*, Vol. xvi. 397.

13. Personal securities pledged for a specific debt; after a mortgage to the creditor, the same securities, with others, were pledged to him for the balance of an account: the transactions being distinct, redemption of the personal securities was decreed without discharging what was due on the mortgage. *Jones v. Smith*, Vol. ii. 372.

14. A. engaged with B. in one mortgage may redeem, though B. has pledged another estate to the same person. *Ibid.* 376.

15. Bond cannot be tacked to a mortgage against the mortgagor or creditors; but may against the heir,

merely to prevent circuitry of action. *Ibid.*

16. Two mortgages to the same party absolute at law; the mortgagee may insist that both or neither shall be redeemed by the mortgagor or his assignee. *Ibid.*

17. No tacking against creditors or assignees for valuable consideration. *Adams v. Claxton*, Vol. vi. 226.

18. A mortgagee cannot tack a subsequent mortgage coming to him as executor, as against mesne mortgagees. *Barnett v. Weston*, Vol. xii. 130.

19. Mortgagee not permitted to tack a mortgage subject to the bankruptcy of the mortgagor, though without notice, and with the legal estate, there being an end of all relation between the individual and his property the moment the act of bankruptcy is committed. *Ex parte Herbert*, Vol. xiii. 183.

20. The severity of the relation under the bankrupt statutes is considerably mitigated by 46 Geo. 3. c. 135. and others. *Ibid.* 187, 188.

Assignees take subject to all the equities. *Ibid.*

EQUITABLE MORTGAGE.

1. Loan of stock to be replaced within twelve months, and make a security by way of mortgage, and deposit of deeds accordingly with wife of the mortgagor, held not to be such a deposit as would constitute an equitable mortgage; but upon the bankruptcy before the day, proof might be made with reference to the agreement. *Ex parte Coming*, Vol. ix. 115.

2. Deposit of part of the title deeds of an estate under circumstances, held to attach a security upon the whole estate. *Ex parte Wetherell*, Vol. xi. 398.

Delivery of, and possession of, deeds is of no other purpose shown, evidence of an agreement that the estate itself shall be a security. *Ibid.*

So the deposit of a lease upon the loan of money. *Ex parte Haigh*, Vol. xi. 403.

3. Where the delivery of the deeds was manifestly intended for the mere purpose of having a mortgage drawn, and not as in present and immediate security, held that the death of the mortgagor before it was executed, could not give the party a lien on the estate. *Norris v. Wilkinson*, Vol. xii. 192.

4. A party purchasing an estate merely from a party in possession, held bound by a previous equitable mortgage, by deposit of title deeds: possession, though the criterion of title to a chattel, is not *prima facie* evidence of title to land; a purchaser is bound to look farther. Notice implied by construction of law, where it is the duty of a party to inquire. *Hiern v. Mill*, Vol. xiii. 114.

5. Where a lease was deposited as a security, the Court directed the commissioners to inquire in respect of what debt it was deposited, and the produce to be applied accordingly. *Mountfort, ex parte*, Vol. xiv. 606.

6. Equitable mortgage by a deposit of deeds, covering subsequent advances, upon evidence that they were made upon that security. *Ex parte Langston*, Vol. xvii. 227.

7. So equitable mortgage, by a deposit of deeds upon an advance of money without a word passing. *Ibid.* 230.

8. Equitable mortgage by deposits of deeds not favoured; especially when contradicting a written instrument. *Ex parte Combe*, Vol. xvii. 369.

9. Equitable mortgage by deposit of deeds. *Monkhouse v. the Corporation of Bedford*, Vol. xvii. §80.

10. The time not enlarged upon a bill of redemption, as upon a bill of foreclosure. *Novosielski v. Wakefield*, Vol. xvii. 417.

11. Equitable mortgage by a deposit of title deeds established, but disapproved: extended to a subsequent advance by the same person only upon clear proof, that it was upon security of the deposit: not to an advance by a third person, unless connected with some dealing with the estate, and the person holding the deposit a mere trustee, having made no advance. *Ex parte Whitbread*, Vol. xix. 209.

12. Inference from a mortgage and the want of indorsement upon some bills in a remittance, that the object as to the whole was deposit, not discount. *Twogood, ex parte*, Vol. xix. 231.

13. Deposit of deeds until a mortgage, as evidence of an agreement for a mortgage, a good equitable title. *Wright, ex parte*, Vol. xix. 258.

14. Equitable mortgage by deposit of deeds, though not now to be disturbed, disapproved; and not extended by inference from a legal mortgage to a subsequent advance. *Ex parte Hooper*, Vol. xix. 477.

15. Equitable mortgage by agreement for a farther advance upon a former deposit of a deed continued. *Ibid.* 479.

And see MORTGAGE, 49.

MORTMAIN.

And see CHARITY, *passim*.—DEVISE, 79.

1. The statute of mortmain meant

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to prevent a person from adding to land already in mortmain. *Blanford v. Thackerell*, Vol. ii. 241.

2. Difference between the statute of mortmain and 12 Will. 3. c. concerning Roman Catholics: the former has the words "charge incumbrance," which are not in the latter. *Pickering v. Lord Stamford*, Vol. ii. 283.

3. Trust of real and personal estate by will, for the purpose of establishing a perpetual botanical garden, declared void, upon the expression of the testator, that he trusted it would be a public benefit. *Townley v. Bedwell*, Vol. vi. 194.

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1. Name of confirmation is the real name. *Delmare v. Robello*, Vol. i. 416.

2. Name given on profession in a convent is not for the world, but the former name continues. *Ibid.* 416.

3. Devise to the devisor's sister A., then unmarried, for life, with remainders to her first and other sons in tail male; to her daughters in tail as tenants in common; to his sister B., then married, for life, and to her first and other sons in tail; remainder to the first and nearest of his kindred, being male, and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body: a person claiming under the last limitation, must be of the name as well as blood; and the qualification as to the name is not satisfied by having the name taken by the king's licence, previous to the determination of the preceding estates. *Leigh v. Leigh*, Vol. xv. 92.

4. A person taking a name by

act of parliament does not lose his original name, and might take a legacy by it. *Ibid.* 100.

5. The effect of the king's licence is only permission to use a name, not imposing it. *Ibid.*

NAVIGATION SHARES.

The shares in the navigation of the river Avon are real estate under 10 Ann. and subject to dower. *Buckeridge v. Ingram*, Vol. II. 652.

NE EXEAT REGNO.

1. *Ne exeat regno*, upon affidavit of wife against husband, refused. *Sedwick v. Walkins*, Vol. I. 49.

2. *Quære*, Whether, upon a suit in the Ecclesiastical Court by the wife for alimony, the Court will grant the writ of *ne exeat regno* against the husband. *Coglar v. Coglar*, Vol. I. 94.

The writ was discharged upon his paying into Court the sum for which the writ was marked, because a better security. *Evans v. Evans*, Vol. I. 96.

3. Writ obtained by one French emigrant against another, discharged upon circumstances appearing upon the affidavits and upon the answer, which may be read, the application not being in the nature of an affidavit to hold to bail, but to the discretion of the Court, applying a remedy not originally applicable to private transactions. In applying it as against foreigners, it would be a term that it shall be simply a case of equity. *De Carriere v. De Callonne*, Vol. IV. 577.

4. Writ of *ne exeat regno*, obtained by a resident here against a resident in the West-Indies, upon a demand arising there, when the

answer came in, was discharged under the circumstances, with costs against the *prochein amy* of the infant plaintiff: but upon the admissions in the answer, the defendant was ordered to give security to abide the decree. *Roddam v. Hetherington*, Vol. V. 91.

5. The writ of *ne exeat regno* issued properly: the subject being matter of account. A general affidavit of belief of the defendant's intention to quit the kingdom is sufficient, without the circumstances upon which that belief was founded. *Russell v. Asby*, Vol. V. 96.

6. Upon an application for the writ of *ne exeat regno*, no subpœna is served: but upon personal service of the writ, the party is bound to appear and put in his answer; and then he may apply to supersede the writ; but not upon his affidavit. *Ibid.*

7. Analogy between the applications for the writ of *ne exeat regno* and to a judge to hold to special bail. *Ibid.* 97.

8. The writ of *ne exeat regno* refused, the circumstances not affording a sufficient ground. *Gardiner v. Edwards*, Vol. V. 591.

9. A writ of *ne exeat regno* refused upon an undertaking for an indemnity. To obtain it there must be an equitable demand in the nature of a debt actually due. *Cock v. Ravie*, Vol. VI. 283.

10. Writ of *ne exeat regno* issues in the case of alimony; but only for sums actually due and costs. *Shaftoe v. Shaftoe*, Vol. VII. 171.

11. Writ of *ne exeat regno* issues in the case of alimony; but only for sums actually due: viz. arrears and costs. *Dawson v. Dawson*, Vol. VII. 173.

12. Analogy between the writ of *ne exeat regno* and bail. *Ibid.* 174.

13. Writ of *ne exeat regno* for

arrears of alimony and costs. *Oldham v. Oldham*, Vol. VII. 410.

14. Affidavit for a writ of *ne exeat regno* must state an intention to go abroad: that the defendant will hide himself is not sufficient. It must be positive, that he is going abroad, or to some declaration, that he is, by himself, not a third person. *Ibid.*

15. To obtain a writ of *ne exeat regno* the affidavit must be positive as to the intention to quit the kingdom, or declarations to that effect. It is sufficient, that the debt will be endangered, without stating that it is to avoid the jurisdiction. *Etches v. Lance*, Vol. VII. 417.

16. *Ne exeat regno*, a high prerogative writ. *Ibid.*

17. To obtain a writ of *ne exeat regno*, it is sufficient that the affidavit states that the debt will be endangered; without alleging that the purpose of going abroad is to avoid the demand. *Tomlinson v. Harrison*, Vol. VIII. 32.

18. Writ of *ne exeat regno* a high prerogative writ; and applied to cases of private right with great caution and jealousy. *Ibid.* 33.

19. Writ of *ne exeat regno* for a demand, upon which bail might be had; viz. the admitted balance of an account; on the ground, that if bail was given, the plaintiff disputing the balance would be entitled to an account, and the defendant could not put him to his election to sue at law or in equity, except upon terms. *Jones v. Sampson*, Vol. VIII. 593.

20. Plaintiff having twice held the defendant to bail, obtained a writ of *ne exeat regno*; discontinuing the action. The writ discharged. *Amsinck v. Barklay*, Vol. VIII. 594.

21. Writ of *ne exeat regno* upon declarations, or facts, as evidence of the intention to go abroad, not discharged upon affidavit denying the intention. *Ibid.*

22. Belief, without circumstance or declarations showing the ground of it, will not sustain a writ of *ne exeat regno*. *Ibid.* 597.

23. A party by the prerogative may be restrained from leaving the kingdom, by the writ *ne exeat regno* and by the great or privy seal recalled; and the Crown, if obeyed, may take his property. *De Manneville v. De Manneville*, Vol. X. 63.

24. Writ confined to cases of equitable debt, and not granted but upon affidavit as positive as to the equitable debt, as an affidavit of a legal debt to hold to bail, not granted upon mere information and belief, except it is matter of pure account. *Jackson v. Petrie*, Vol. X. 164.

25. The original object of the writ being to prevent a subject going to the king's enemies, and the construction being, that going to foreign parts means going out of the jurisdiction. Court refused the writ against a peer going to Ireland. The Court of Exchequer, in granting orders of this nature, applies them only to cases to which this Court would apply the writ. *Bernal v. Marquis of Donegal*, Vol. XI. 45.

26. An affidavit, stating only information and belief of an intention to quit the kingdom, held not sufficient; so mere information that there was a general order for all military officers in the service of the East India Company to join. *Hannay v. M'Entire*, Vol. XI. 54.

27. Court will not go the length of granting the writ merely because a judge at chambers would order bail. The Court of King's Bench will hear nothing against the affidavit; but the Court of Common Pleas hears affidavits in explanation. *Ibid.*

28. Writ of *ne exeat regno*, upon

a legal demand against an attorney, on the ground of his privilege, by analogy to the case of equitable demands, refused. *Gardner v.* — Vol. xv. 444.

29. The Court will grant the writ of *ne exeat regno* with regard to arrears of alimony actually due—it is in the nature of equitable bail; but not for uncertain damages, by analogy to the discretion of judges at law in cases where probably considerable damages would be given. *Haffey v. Haffey*, Vol. xiv. 261.

30. Writ of *ne exeat regno*, upon the concurrent jurisdiction in account, though bail might be had at law. Against a positive affidavit, the defendant's affidavit, or evidence of the plaintiff's admission that no debt is due, will not avail. The affidavit of a threat or intention to go abroad must be positive, not upon information or belief. *Jones v. Alephsin*, Vol. xvi. 470.

31. Writ of *ne exeat regno*, on affidavit, not by the plaintiff to information and belief of intention to quit the kingdom, according to the nature of the information; as, where received from persons of the defendant's family, that they were about to go to the Isle of Man. *Collinson v.* —, Vol. xviii. 353.

32. Prayer for the writ of *ne exeat regno* in the bill not essential; nor affidavit of the debt established by the Master's report absolutely confirmed. *Ibid.*

No notice of motion for the writ. *Ibid.* 355.

33. Writ of *ne exeat regno* obtained on behalf of a lunatic by his committee, on a note as given for the balance of an account, restraining the captain of an East India ship from proceeding on his voyage. That the debt will be endangered is sufficient, without stating that the object is to avoid the jurisdiction. *Stewart v. Graham*, Vol. xix. 313.

34. Writ of *ne exeat regno* discharged, as having issued improperly on the affidavit of a plaintiff, resident out of the jurisdiction, in Scotland, sworn before a justice of peace there; not positive to a declared intention to leave the kingdom, or circumstances amounting to it, but only to information and belief of such intention: a defect not supplied by the avowal in defendant's affidavit of his intention to return to his house of business in Jamaica, where alone he has the means of settling the account. *Hyde v. Whitfield*, Vol. xix. 342.

35. To support a *ne exeat regno*, which issues only on an equitable debt, as at law to hold to bail, the affidavit must be positive, except that belief of the balance of an account is sufficient. *Ibid.*

36. The analogy between the writ of *ne exeat regno* and a bailable writ at law, not universal. The Court of King's Bench formerly would not hear defendant to reduce the amount of bail; but this Court always heard defendant attempting to get rid of the writ. *Ibid.* 344.

37. The ground on which the writ of *ne exeat regno* issued is always stated in the body of it. *Ibid.* 345.

NEXT OF KIN.

See KIN.

NOTICE.

And *see* COPYHOLD, 36.—VENDOR AND PURCHASER, [B.] 35. 48.

53.—VOLUNTARY SETTLEMENT, 14.

1. Vendee says he has bought, vendor is silent, conclusive notice to a third person. *Weymouth v. Boyer*, Vol. i. 425.

2. Reasonable notice a question for the Court or jury. *Peacock v. Peacock*, Vol. xvi. 56.

3. The possession of a tenant is notice to a purchaser of the actual interest he may have, either as tenant, or farther, as in this instance, by an agreement to purchase the premises. *Daniel v. Davison*, Vol. xvi. 249.

4. Specific performance of a contract to purchase enforced against a subsequent purchaser, at an advanced price, with notice; who was decreed to convey, on payment to him of the price for which the plaintiff contracted. *S.C.* Vol. xvii. 433.

5. The possession of a tenant is notice to a purchaser of the actual interest he may have, either as tenant, or farther, as in this instance, by an agreement to purchase the premises. *Ibid.*

6. *Lis pendens* not notice for the purpose of postponing a registered deed. *Wyatt v. Barwell*, Vol. xix. 439.

NUISANCE.

1. Jurisdiction by injunction on information by the Attorney General or the relation of individuals, against a nuisance by an offensive and unwholesome process in trade, not exercised without a trial at law; regulating according to justice the time of trial of an indictment depending, and removed by *certiorari* into the King's Bench, from the assizes, as against the relators; whether as against the defendants, *Quære*. *Att. Gen. v. Cleaver*, Vol. xviii. 211.

2. Instances of trades offensive, and in some degree unwholesome, not legally a nuisance. A sugar-house, brew-house, &c. injunctions in such cases cautiously granted, and not *ex parte*. *Ibid.* 217.

OUTLAWRY.

3. Jurisdiction upon public nuisance in a highway or a harbour: if upon the King's soil, the Crown may abate; if not, the fact must be tried by a jury. *Ibid.* 218.

4. Manufacture of bricks not nuisance. *Ibid.* 219.

5. Nuisance at common law by using articles of recent discovery as gunpowder or gas, so as to cause danger to the public. *Crowder Tinkler*, Vol. xix. 623.

6. Construction of the statute Geo. 3. c. 61. not authorising a powder-mill, which would be a nuisance at common law; though, as working at the commencement of the act, not liable to the penalties imposed by it. *Ibid.*

OCCUPANCY.

1. Executor may be a special occupant. *Ripley v. Waterworth*, Vol. vii. 440.

2. Requisites to occupancy: a vacant possession, and a filling up of it by some person, who meant to occupy. *Ibid.* 442.

3. No special occupancy of a rent, being an incorporeal hereditament; but if the heirs, &c. are named in the grant, the executor is said to be *quasi* occupant. *Ibid.* 448.

ORPHANAGE.

An orphanage share under the custom of London is subject to debts. *Anderson v. Maltby*, Vol. ii. 254.

OUTLAWRY.

1. Defendant being outlawed, motion that he might appear within a limited time upon the equity of 5 Geo. 2. c. 25. granted; though he

PARENT AND CHILD.

had not been in the kingdom for two years before subpœna. *Anon.* Vol. II. 188.

2. Outlawry is at this day the common process in Ireland. *Simmonds v. Lord Kinnaird*, Vol. IV. 738.

PARAPHERNALIA.

The claim to paraphernalia not to be disappointed by the effect of the option of a creditor, having a double fund. *Aldrick v. Cooper*, Vol. VIII. 397.

PARENT AND CHILD.

1. A father may leave his children without a maintenance, and the parish have no remedy against the executor. *Rawlins v. Goldfrapp*, Vol. V. 444.

2. A son, tenant in tail in remainder, when just of age, in 1769, joined his father, tenant for life, in a recovery, for the purpose of raising 3000*l.* for the father, and reselling the estate, the son taking back only an estate for life, with remainder to his first and other sons, &c. Whatever equity he might have had against that settlement was lost by his marriage and acquiescence till after the death of his father in 1793; though under the circumstances there was no probability of issue. Upon that ground a bill by the trustees under a general trust for his creditors, claiming as purchasers under the statute 27 Eliz. c. 4. was dismissed without deciding whether they could sustain that character; or, how far a settlement, merely as being voluntary, is affected by the statutes of Elizabeth. *Brown v. Carter*, Vol. V. 862.

3. The Court, as representing the king as *parens patriæ*, may, under

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circumstances, control the right of a father to the custody of his child; as where the father, an alien, married a subject, and his child was entitled to considerable property, order made to restrain him from removing, or doing any act towards removing the child from out of the jurisdiction; but the mother having separated herself from the husband, Court refused to give her the custody. *De Manneville v. De Manneville*, Vol. X. 52.

4. The King's Bench has no such delegated authority as representing the King. *Ibid.*

5. No affidavit is necessary to obtain an order that a child, a ward of Court, shall not be taken out of jurisdiction, even to go to Scotland. *Ibid.* 56.

6. In cases of ill treatment, or to prevent the husband taking the interest of the wife's money in Court, her affidavit may be read. *Ibid.*

7. The Court will do what is for the benefit of an infant upon petition presented on its behalf, without regard to the prayer. *Ibid.* 59.

PARLIAMENT, PRIVILEGE OF.

And see MEMBER OF PARLIAMENT.
—PEER.

1. Bill for a reconveyance of a qualification to sit in parliament given by a father to his son, dismissed with costs. *Curtis v. Perry*, Vol. VI. 747.

2. The authority to take the bill *pro confesso* against a defendant having privilege of parliament, standing out process of contempt, under stat. 45 Geo. 3. c. 124. § 5. is confined to bills for discovery only. *Jones v. Davis*, Vol. XVII. 368.

3. Costs against an officer violating the privilege of parliament,

from arrest. *Wood, ex parte*, Vol. XVIII. 3.

PARTNERS.

And see BANKRUPT, [P.]—CORPORATION, 6.—FRAUD, 8.—THEATRE, 2.—TRUST ESTATE, 7.

1. The Court has sometimes taken the management of a brewery, to prevent one partner from destroying the adventure. *Ex parte O'Reilly*, Vol. I. 130.

2. Judgment against one of two partners; execution to be only of a moiety; but in equity, upon the failure of one, the partnership fund is to be distributed among the joint creditors. *Hankey v. Garret*, Vol. I. 240.

3. If joint tenants of leasehold or freehold lay out money jointly upon it, in the way of trade, there is no survivorship. *Lyster v. Dolland*, Vol. I. 435.

4. An advantage to be taken by a partner, out of the trade, may be measured in any way agreed on, and will not be usurious. *Anderson v. Maltby*, Vol. II. 248.

5. Bill by partner, under a parol agreement, charging misconduct in the other partner, and praying a dissolution, account, and injunction from existing securities in the name of the firm: demurrer to the prayer for a dissolution, because there was no writing between them, overruled, *Master v. Kirton*, Vol. III. 75.

6. Bankers, upon a deposit of money with them, gave notes bearing interest: the partnership was dissolved; one of the partners soon afterwards died, and his creditors were called by advertisement; another partnership was formed by the survivors and others, who reissued notes of the former partnership, and paid the interest of the deposit-notes for near two years, when they failed; the assets of the deceased partner

are not discharged. *Daniel v. Cross*, Vol. III. 277.

7. Partners bound by an instrument executed by one in the presence of the others. *Burn v. Burn*, Vol. III. 578.

8. Though one of three partner be an infant, yet the action must be against all three. *Ex parte Henderson*, Vol. IV. 164.

9. A separate creditor has no right against the joint property, farther than the separate interest of the partner; viz. his share, upon a division of the surplus, subject to the accounts of the partnership. Joint property of an insolvent partner, therefore, taken in execution for a separate debt, cannot be held against the joint creditors. *Taylor v. Field*, Vol. IV. 396.

10. Assignee, executor, or separate creditor, coming in the right of one partner against the joint property, comes into nothing more than an interest, subject to an account, &c.; and therefore to the joint debts. Assignee, under a separate commission, has only the same right to stand in the place of the bankrupt by the common law, not under the bankrupt laws. *Ibid.*

11. The question being, whether a partnership subsisted in the trade of a colliery, a question of fact to be tried by evidence, as upon an issue; the Lord Chancellor, upon appeal, affirmed the decree upon the points decided at the Rolls; and held farther, that the case was within the statute of frauds: the interest in the lease passing as an incident to the trade by operation of law; and the evidence from books and letters was admitted; and an issue refused. *Forster v. Hale*, Vol. V. 308.

Partnership only proved by fact *aliunde*, and not by the evidence of the parties themselves. *Ex parte Benfield*, Vol. V. 424.

12. The goodwill of a trade, car-

ed on in partnership without articles, survives, and is not partnership stock. Profits, accrued after the death of one partner, are joint property. *Hammond v. Douglas*, Vol. 539.

13. Whether, and under what circumstances, a trader can plead in statement a partner abroad, *Quere.* Vol. vi. 438.

14. To make a partnership liable to a demand, in respect of a separate transaction, an agreement must appear. *Ex parte Peele*, Vol. vi. 602.

15. Ships purchased by one partner held separate property, as between the creditors after his bankruptcy and the death of the other, upon the circumstances; particularly the registry being made in the name of the one partner only; and being afterwards continued for a purpose, that would have prevented any claim of the other; viz. a fraud upon an act of parliament. *Curtis v. Perry*, Vol. vi. 739.

16. Partnership of three manufacturers in Lancashire sold their goods in London in the names of two only: upon their bankruptcy, as among their creditors, the property was held to be where the order and disposition was at the time of the bankruptcy, according to statute 21 Jam. 1. c. 19. § 10, 11. *Ibid.* 747.

17. Demurrer to a bill by some members of a lodge of Freemasons against others to have the dresses and decorations, books, papers, and other effects of the society, delivered up; and an injunction was allowed, on the ground that they affected to sue in a corporate character; but leave was given to amend; the Court holding jurisdiction for the delivery of a chattel; and, where there is a joint interest, permitting some to sue as individuals, representing the rest, in other instances than those of creditors and legatees, if incon-

venient to justice that all should be parties. *Lloyd v. Loaring*, Vol. vi. 773.

18. Injunction to restrain a surviving partner from disposing of the joint stock, and receiving the outstanding debts. *Hartz v. Schrader*, Vol. viii. 317.

19. Power of a partner to bind the partnership; unless, from the nature of the transaction, it can be inferred to be separate; in which case previous authority or subsequent approbation must be shown. Under these circumstances, proof in bankruptcy undisputed since 1793, and no one to explain the transaction but one partner, inquiry refused. *Ex parte Bonbonus*, Vol. viii. 540.

20. No execution of an agreement for a partnership, some of the parties might dissolve it immediately afterwards. *Hency v. Birch*, Vol. ix. 357.

21. Interests in a partnership trade, under articles, to the widows of partners, and after to their respective children equally, held not to be vested in children dying in the lives of their mothers, the primary object being to constitute a partnership, and to ascertain the manner in which the shares were to be enjoyed in succession; the vacancy must happen before the succession could be ascertained. *Balmain v. Shore*, Vol. ix. 500.

22. Where real estates were purchased for the purposes of such partnership trade, to be used in the trade as long as the partnership lasts, with a stipulation that, notwithstanding their interest in them as tenants in common, the partnership shall have a certain ownership; held that the property was not thereby varied, and subject to the covenant, it went as real estate. *Ibid.*

23. Upon a dissolution by agreement, and covenant by the continuing partner to pay all debts, &c. who shortly after became bankrupt, held that the question, whether that which had been joint estate had become separate, depended upon the *bona fides* of the transaction. *Ex parte Williams*, Vol. x. 3.

Equities subsisting among partners, and their effects, as between each other and creditors. *Ibid.*

24. In cases of partnerships, possessing houses, &c. the difficulty of distinguishing and arranging property, partly real and partly personal, has never, except by the effect of the contract or will, been held sufficient against the heir. *Stewart v. Marquis of Bute*, Vol. xi. 665.

25. One partner permitted to act for the other, upon a power of attorney, though not executed by all the partners, to vote in the choice of assignees. *Mitchell, ex parte*, Vol. xiv. 597.

26. Bill by assignees of a bankrupt, claiming a debt, which had been paid to his partner, as paid after notice of dissolution of the partnership, that partner retiring, and the bankrupt continuing, dismissed; the terms of the alleged arrangement not being made out, so as to establish the right in equity of the bankrupt against the legal right of the other partner.

The other questions, therefore, were not determined:

First, whether a demand, the result of an overpayment in advance upon a single transaction of sale between merchants, or merchant and factor, was within the exception as to merchants' accounts, in the statute of limitations.

Secondly, as to the effect of that exception; whether including merchants' accounts generally, or those

only with items continuing within the six years?

Thirdly, upon the objection laches, independent of the statute. *Duff v. East India Company*, Vol. xv. 198.

27. Payment to one partner a good discharge. *Ibid.* 213.

28. One partner cannot sue separately. *Ibid.*

29. A partnership being dissolved by the bankruptcy of one partner, the assignees are entitled, beyond an account and distribution of the stock, &c. to a participation of subsequent profits, made by the other partners, carrying on the trade with the capital, as constituted at the time of the bankruptcy.

As far as the profits may have been produced by a joint application of that and other funds, *Quære*. *Crawshay v. Collins*, Vol. xv. 218.

30. Implied obligations among partners, as far as they are not regulated by express contract; for instance, to use the joint property for the benefit of all the owners. *Ibid.* 226.

31. Partnership may, after the determination of it by the contract of the partners, continue for the purpose of winding up engagements with third persons. *Ibid.*

32. Partnership determined by death: the legal property survives, not the beneficial interest. Right of the executor to the value of the testator's interest, to be ascertained not by calculation but by sale. *Ibid.* 227.

33. Whether, upon the death of a partner, the goodwill survives, *Quære*. *Ibid.*

34. Partnership bound by the signature of one partner. *Ex parte Gardom*, Vol. xv. 286.

35. Assignment by one partner of joint property, to secure his separate debts, must be subject to the

joint debts. *Young v. Keighley*, Vol. xv. 557.

36. Partnership, without any provision as to its duration, may be determined without previous notice, subject to the accounts, to wind up the concern. *Peacock v. Peacock*, Vol. xvi. 49.

37. Partnership, without any stipulation as to the proportions: the partners entitled, in equal moieties. *Ibid.*

38. Affidavits admitted on motion, after answer, for an injunction and receiver in the case of partnership, by analogy to waste. *Ibid.*

39. Creditors, as such, independent of special contract, have no lien or charge on the effects; but in the distribution of joint estate, obtain payment through the equities of the partners, among themselves. *Ex parte Kendal*, Vol. xvii. 526.

40. Partnership by agreement, for a participation in profits, or their application. *Ex parte Langdale*, Vol. xviii. 300.

41. Partner without participation of profit, by lending his name, though contracting that he shall suffer no loss. *Ibid.* 301.

42. Motion by defendants to a bill for a partnership account for a production of the accounts before answer refused. *Pickering v. Rigby*, Vol. xviii. 484.

43. Partner by a share in profits without interest in capital. *Ex parte Hodgkinson*, Vol. xix. 291.

44. Option of creditor without notice of a dormant partner to consider himself a joint or separate creditor. *Ibid.* 294.

45. Plea in abatement that there is a dormant partner. *Ibid.* 294.

46. Dormant partner. *Ex parte Norfolk*. Vol. xix. 455.

47. Partner by a share in the profits without interest in the capital. *Ibid.* 457.

48. Election of a creditor to resort to a dormant partner as a joint creditor or not. *Ibid.* 458.

49. As to late decisions at law in favour of a plea of dormant partner, *Quære. Ibid.*

50. Partner by the use of his name, without interest in the profit. *Ex parte Watson. Ibid.* 459.

51. Mortgage to partners, their heirs and assigns, to secure debts due, or to become due, to them or the survivor, whether available to a new partnership, formed by the addition of another, in whose time the debt accrued, *Quære. Ibid.*

52. Distinction between a dormant and nominal partner. The former liable in respect of profits: but one receiving a salary, not charged on profits, is not by that a partner. *Ibid.* 461.

53. As to an action by one for a debt, contracted with him and another, permitted to prove that he was not a partner, and the plea of dormant partner, where not to the plaintiff's injury, *Quære*. Difficulty upon that with reference to the case of principal and surety. *Ibid.*

PARTY.

And see *BARON AND FEME*, 9.—
CORPORATION, 3.

1. Residuary legatee must be party to bill for specific legacy, and there must be a general account, if assets are not admitted; otherwise if they are. *Wainwright v. Waterman*, Vol. i. 313.

2. Joint owner not necessary party to bill against factor on a demand against the other moiety, defendant having kept separate accounts, and admitted the produce of that moiety to be in his possession. *Weymouth v. Boyer*, Vol. i. 417.

3. *A.* stated by books in evidence for defendant to be a merchant abroad, and one witness swearing, he knew him late a merchant abroad, and no evidence of his return, sufficiently proved out of the jurisdiction, as would be presumed at law; and defendant precluded from objecting, that he was not a party. *Weymouth v. Boyer*, Vol. I. 417.

4. Defendant examined as a witness: bill dismissed as to him with costs. *Ibid.* 418.

5. To bill by assignee of judgment assignor is a necessary party. *Cathcart v. Lewis*, Vol. I. 463.

6. Timber purchased for a colliery: before it was applied to the use of the colliery some of the owners retired; and it was paid for by those only who remained; the former owners are not necessary parties to a suit by those who remained, against the vendor on account of that sale. *Massey v. Davies*, Vol. II. 317.

7. Bill by one trustee of stock against the other to compel him to replace it or give security according to his engagement, when the plaintiff joined in transferring the stock into his name: demurrer, because the *cestuys que trust* were not parties, overruled. *Franco v. Franco*, Vol. III. 75.

8. Bill by devisees in trust to sell for specific performance of an agreement to purchase: exception to the report in favour of the title, that the persons entitled to the purchase-money, subject to debts, legacies, and other charges, were not parties to the suit: the Lord Chancellor was of opinion, they ought not to be parties to the conveyance: and if they were, their covenant ought to extend only to their own acts and those of the devisor; not to a general warranty, without a special contract for it: but as the point

must come properly upon objections to the conveyance, the exception was overruled upon the form. Exception, that the persons entitled to the purchase-money subject to the charges, were not parties to the conveyance, overruled. *Wakeman v. the Duchess of Rutland*, Vol. III. 233. 504.

9. Bill by devisees in trust to sell for specific performance of an agreement to purchase: that the heir of the devisor is not a party to the suit is not matter of exception to the report in favour of the title. *Ib.* 234.

10. Co-defendants not bound as to their rights with respect to each other, unless called upon to contend upon them. *Harmood v. Oglander*, Vol. VIII. 123.

11. Devise to trustees and their heirs to the use of other trustees for 1000 years: upon trust by sale, lease, mortgage, or otherwise, to raise and pay such sum as the personal estate should fall short of the debts; and after raising and paying thereof then in strict settlement. A bill being filed by creditors, the personal estate proving deficient, and the trustees of the inheritance having contracted to sell under a power, upon their supplemental bill, praying the benefit of the accounts against the surviving trustee of the term, though no party to the original cause, that the debts may be paid out of the purchase money, and that on payment the term may be assigned to the purchasers, it was so decreed; the defendants not objecting. *Fletcher v. Hoghton*, Vol. V. 550.

12. To a bill against a vendor for a specific performance, his stewards and receivers ought not to be made parties. A specific performance being decreed, the bill as against them was dismissed with costs. *McNamara v. Williams*, Vol. VI. 143.

13. Defect of parties: defendant being liable to another suit. *Bromley v. Holland*, Vol. VII. 11.

14. Upon objection for want of parties, it is not necessary to point out the parties by name, but sufficient if the objection points out who the individuals are by some description, enabling the plaintiff to make them parties. *Attorney-General v. Jackson*, Vol. XI. 369.

15. Where it is impracticable to go on with a record, attempting to bring all parties having interests in the subject to be charged the rule, that all parties interested shall be brought before the Court, will not be pressed; so when it is attended with inconvenience almost amounting to that. *Adair v. New River Company*, Vol. XI. 429.

16. The only case in which a person, against whom relief is prayed, is allowed to be made a party, is that of the agent of a corporation. *Le Texier v. Marg. of Anspach*, Vol. XV. 164.

When an agent is so involved in a fraud that the Court will charge him with costs, though relief cannot be prayed against him, yet if the costs are not prayed against him a demurrer lies. *Ibid.*

17. The strict rule, that all persons, materially interested, must be parties, dispensed with, where it is impracticable, or very inconvenient; as in the case of a very numerous association in a joint concern; in effect a partnership. *Cockburn v. Thompson*, Vol. XVI. 321.

18. Defect of parties the subject of demurrer, or plea, as it appears, or not, on the face of the bill. *Ibid.*

19. Distinction between partners and creditors, and between general and scheduled creditors, by analogy to the rule at law, that a plea in abatement must show the proper party. *Ibid.* 325.

20. Where it has been held suffi-

cient to bring before the Court the first person, having an estate of inheritance. *Ibid.* 326.

21. All obligors in a joint and several bond, principal and sureties, must be parties, generally.

Exception, where the surety is insolvent; or has paid nothing. *Ibid.*

22. Generally, a residuary legatee must bring before the Court all persons interested in the residue.

Exception, where not necessary or convenient. *Ibid.* 328.

23. Various cases, where parties dispensed with: bills by or against some tenants of a manor; as for suit to a mill, &c.: some parishioners for tithes, or a *modus*: societies for insuring each other; which is not within the statute 6 Geo. 1. c. 18. *Ib.*

24. Plaintiff cannot put off the cause for defect of parties, without consent, or a special ground; as, that he was not aware of the existence of such parties. *Innes v. Jackson*, Vol. XVI. 356.

25. Bill by a bankrupt, and the assignee, under an insolvent act, of which he afterwards took the benefit against representatives of the deceased assignees, and others, for an account of his estate and various transactions before and since the bankruptcy: no assignee in the bankruptcy being a party, and collusion with persons accountable to the estate charged against only some of the representatives of the assignee. Demurrer allowed generally for want of equity, and as relief might be had by petition in bankruptcy; and *ore tenus*, the suit being multifarious as uniting parties, though in some respect connected having distinct interests. *Saxton v. Davis*, Vol. XVIII. 72.

26. Difficulty from the number of parties not to prevent the Court acting to enforce a legal right. *Adley v. Whitstable Company*, Vol. XIX. 305.

And see DEMURRER, 6.

PARTITION.

And see WILL, [C.] 5. 50, *et seq.*—
POWER, 70.

1. Partition of an estate in common, a good execution of a power to sell or exchange. *Abel v. Heathcote*, Vol. II. 98.

2. Partition is a proceeding at law, but Chancery entertains suits for it, although no original jurisdiction and no express authority be given by the statute as to joint-tenants. *Mundy v. Mundy*, Vol. II. 124.

3. The question whether a widow is entitled to arrears from the death of her husband, or only from her claim, cannot be decided on a writ of dower. *Ibid.* 128.

4. Account would be decreed upon a bill, on a mere right of entry, if defendant admitted the title and receipt of rents and profits. *Ibid.*

5. No costs to plaintiff in a writ of dower. Such writs are almost out of use: can only be opposed by a legal bar: formerly no other, but equitable bars now in daily practice. *Ibid.*

6. On a bill for partition, the costs of executing the commission, and of all necessary proceedings in the cause must be defrayed by the parties in proportion to their interests. *Calmady v. Calmady*, Vol. II. 568.

7. No objection that other persons may come *in esse*, and be entitled. *Wills v. Slade*, Vol. VI. 499.

8. Commission of partition of a house decreed. *Turner v. Morgan*, Vol. VIII. 143.

9. Under a commission to four persons, two separate returns were made, one by the two chosen by plaintiff, and the other by those chosen by the defendant, held that it was in law the judgment of none

of them, nothing could be done upon either, Court issued another commission directed to five commissioners. *Watson v. Duke of Northumberland*, Vol. XI. 153.

10. Decree for partition among several joint proprietors, and no objection from a covenant not to inclose without general consent, rights of common and the inequality and uncertainty of the shares in proportion to other estates. The decree directed a reference to the Master to inquire, whether the plaintiff and defendants, or any and which are entitled; and in what shares, according to the respective values of the other estates, and then a commission to divide accordingly; the costs of the partition to be borne by the parties in proportion to the value of their respective interests, and no previous or subsequent costs by analogy to the proceedings at law. *Agar v. Fairfax*, Vol. XVII. 533.

11. Upon a bill for a partition, the interests and proportions to be ascertained by the Court, not the commissioners. *Ibid.* 543.

12. A partition never affects third parties; rights of common, for instance. *Ibid.* 544.

13. Commission to make partition, not under the authority of an act of parliament, but from the difficulty attending partition at law, where the plaintiff must prove his title, as he declares, and also the titles of the defendants, by analogy to the equitable jurisdiction in the case of dower. *Ibid.* 552.

PATENT.

And see INJUNCTION, 2. 13.

1. Patent for representing Italian operas, refused to be sealed, because the provisions for carrying it on were under an agreement with the Lord Chamberlain, his executors

and administrators, and the right to the patent not sufficiently connected with the property in the house. Party applying for patent must make out a case not sufficient only to answer objections; nor will the Court sign a patent which does not put a party under control, though there be no *caveat*. *Ex parte O'Reilly*, Vol. I. 112.

2. Patent even in fee cannot stand if abused. *Ibid.* Vol. I. 118.

3. It must be taken under proper restraints. *Ibid.* 128.

Quere, If it can be the subject of a trust? *Ibid.*

4. There must be separate bills upon distinct invasions of a patent: otherwise of a right of fishery, or the custom of a mill. *Dilly v. Doig*. Vol. II. 487.

5. Enrolment of a patent cannot be dispensed with for the purpose of preventing the specification being made public. *Ex parte Koops*, Vol. VI. 599.

6. After a patent has passed, the time for enrolment cannot be enlarged without an act of parliament. *Ibid.*

7. Since the union of Great Britain and Ireland, the great seals are distinct for patents among other purposes. *Universities v. Richardson*, Vol. VI. 708.

8. Where a patent granted for an original machine had expired, and the party had obtained another for improvements, the specification of which described the original machine with such improvements as one entire machine without distinguishing the improvements, the Court granted an injunction on the ground of long possession, but directed an issue to be tried speedily ascertain whether the condition enrolling the specification had been duly complied with. *Harmer v. Plane*, Vol. XIV. 130.

PAUPER.

1. Pauper is liable to be committed for filing an improper bill. *Pearson v. Belchier*, Vol. IV. 630.

2. Party dispaupered, the affidavit being that he was not worth 5*l.*, except the matters in question. *Spencer v. Bryant*, Vol. XI. 49.

3. The Court is always tender of dispaupering a party. *Whitelocke v. Baker*, Vol. XIII. 511.

4. Practice at law as to suing in *forma pauperis*. *Corbett v. Corbett*, Vol. XVI. 407.

5. Pauper not proceeding to trial, after giving notice, dispaupered, or not permitted to proceed. *Ibid.*

Whether proceedings would be staid in an action by a pauper, until payment of costs of a nonsuit in a former action for the same cause, as a pauper or not, *Quere. Ibid.* 410.

6. Costs to a pauper.

Whether more than out of pocket, *Quere. Frost v. Preston*, Vol. XVI. 160.

7. Plaintiff a pauper. Costs of impertinences expunged from the answer, ordered to be taxed as *dives* costs, to be paid into Court. *Rat-tray v. George*, Vol. XVI. 232.

8. Different decisions as to costs to a pauper. *Ibid.* 233.

9. Costs against a pauper for scandal. *Ibid.* 234.

10. Improper and vexatious conduct in a former suit, or a subscription, though liable to be impeached as maintenance, no ground for dispaupering. *Corbett v. Corbett*, Vol. XVI. 407.

Notice of motion by a party in *forma pauperis*, must be signed by the clerk in Court. *Gardiner v. —*, Vol. XVII. 387.

PEER.

1. Construction of the general

order, 13th January, 1794, in the case of a peer, defendant; that in the cases specified, upon application for time to answer, the defendant shall enter his appearance; and undertake, that, if the answer is not put in, a sequestration shall go: *i. e.* a sequestration absolute. *Gregor v. Lord Arundel*, Vol. viii. 87.

2. Peeress answering upon honour, in exactly the same situation as another defendant answering on oath. *Gilpin v. Lady Southampton*, Vol. xviii. 469.

PENSION.

To entitle the widow of an officer in the army to the pension from government, the marriage must have taken place before he retired from the service. *McKenny v. East India Company*, Vol. iii. 204.

PERPETUITY.

And see EXECUTORY DEVISE.

1. An unborn child of a person *in esse* may be made tenant for life; if beyond that the absolute interest is disposed of. *Routledge v. Dorril*, Vol. ii. 357.

2. A limitation of personal property after a disposition, that would raise an intail express or implied in real estate, is void; and the person, who would be tenant in tail, takes the absolute interest. *Chandless v. Price*, Vol. iii. 99.

3. No limited number of lives for the purpose of postponing the vesting of an executory devise. *Thelhusson v. Woodford*, Vol. iv. 313.

4. Limitation of a term, or the trust of a term, for twenty lives, &c. being successively held good. *Ibid.* 332.

5. By the law of Scotland land

PERPETUITY.

may be made unalienable for ever, under certain regulations. *Ibid.* 339.

6. Residue of personal estate bequeathed to the children of the testator's two daughters, their executors, &c. with a limitation over, in case both his daughters should die without issue: a vested interest in the grand children: and the limitation over is too remote. *Rawlins v. Goldfrap*, Vol. v. 440.

7. Trust by deed, creating estate in tail, after any contract for alienation to raise a sum of money for the persons next in the course of limitation, declared void, as tending to a perpetuity, and inconsistent with the rights of the tenant in tail. *Mainwaring v. Baxter*, Vol. v. 458.

8. A limitation, which would create an estate tail as to freehold property, would give the absolute interest as to personal estate. *Ex parte Sterne*, Vol. vi. 159.

9. Bequest of personal property to A. for life; and after her decease to her children, when at the age of twenty-seven respectively; and in the event of her not leaving any child or children, or of the death of all under the age of twenty-seven, over. The limitation over too remote. *Cambridge v. Rous*, Vol. viii. 24.

10. Testatrix gave all her estate, real and personal, to her daughter and her heirs, and half the navigation money for her natural life; and in case she dies without issue, all to be divided between four nephews and nieces named; the part of one only for life, and to be divided between the survivors. The limitation over too remote, there being no expression or circumstance to limit the generality of the words to a failure of issue at the time of the death. As to what property it extends to, *Quare*. *Barlow v. Salter*, Vol. xvii. 479.

PERPETUATING TESTIMONY.

11. The words "die without issue" have their legal signification, viz. a general failure; unless there are expressions or circumstances from which it can be collected that they are used in a more confined sense. *Ibid.* 482.

12. Though where nothing but a life interest is given over upon a failure of issue, it must necessarily be intended a failure within the compass of that life; where the entire interest is given over, the mere circumstance that one taker is confined to a life interest, furnishes no indication of an intention to make the whole bequest depend on the existence of that person, when the event happens on which the limitation over is to take effect. *Ibid.* 482.

13. Devise for life, and in default of issue, to another for life; and in default of his issue, remainder over: the limitation over void, as to the personal property, either as too remote, or an estate tail by implication. *Ibid.* 484.

PERPETUATING TESTIMONY.

1. Demurrer allowed to bill to perpetuate testimony to a right of common and of way, because charged so generally, that defendant could not know the point to be examined to. *Cresset v. Mitton*, Vol. i. 449.

2. Bill to perpetuate testimony of the legitimacy of the plaintiffs, entitled in remainder in tail after an estate for life: demurrer by the 7th and 8th in remainder after the plaintiffs and the other defendants, all infants, over-ruled: any interest, however slight, being sufficient. *Lord Dursley v. Fitzhardinge*, Vol. vi. 251.

PERPETUATING TESTIMONY. 271

3. The next of kin of a lunatic, however hopeless his condition, have no interest whatever in the property; and therefore cannot sustain a bill to perpetuate testimony. So an heir apparent cannot have a writ *de ventre inspiciendo*. But they may contract upon their expectations; and may perpetuate testimony with reference to the interest so created. *Ibid.* 260.

4. The Court will not perpetuate testimony of a right, which may be immediately barred by the defendant. *Ibid.* 262.

5. To support a bill to perpetuate testimony, the plaintiff must have an interest: but the minuteness or remoteness of it is no objection. A mere contingency, however near and valuable (with the exception of the case of a wager) the expectation of issue in tail, heir apparent, or next of kin of a lunatic, not sufficient: therefore, a demurrer to a bill by tenant in tail in remainder and his issue, to perpetuate testimony of the validity of his marriage, allowed. Whether a bill could be maintained by the trustees to preserve contingent remainders, representing also the legal inheritance of the whole estate, *Quere. Allan v. Allan*, Vol. xv. 130.

6. Depositions *in perpetuum rei memoriam*, not published in the life of the witness except on incapacity to travel by sickness, &c.: such orders, except in the excepted cases, proceeding on affidavit of the death of the witness: some expressly declaring, that the depositions of the other witnesses shall not be read. *Morrison v. Arnold*, Vol. xix. 670.

7. Distinction between examination *in perpetuum rei memoriam* and *de bene esse*. In a suit for the former purpose after the examination there is an end of the cause. *Ibid.*

PERJURY.

To convict for perjury, what is sworn must be both false and material. *Clapham v. White*, Vol. VIII. 38.

PERSONAL ESTATE.

Personal estate is so fluctuating in its nature, that it is impossible to make every specific article the subject of settlement. Vol. v. 274.

And see MONEY AS LAND—ASSETS—CHARGE AND DISCHARGE, *passim*.

PLEADING.

And see FINE, 5.

1. Demurrer only admits facts well pleaded, and the facts alone without the conclusion of law. *Ford v. Peering*, Vol. I. 78.

2. Demurrer lies when it is clear that taking the charges to be true, the bill would be dismissed at the hearing. *Utterson v. Mair*, Vol. II. 95.

3. To a charge on a bill that A. died, seized in fee of estates in Derbyshire and elsewhere; plea, of fine of all the estates charged in the bill and of which A. died seized in fee, held to be sufficient averments, that they were in Derbyshire and none elsewhere. But Court would not intend that there were advowsons, merely because mentioned in the fine. *Butler v. Every*, Vol. I. 136.

4. If defence to bill for specific performance of agreement for a purchase depends merely on want of title in vendor, defendant ought to rest on his answer, and not file cross bill to have it delivered up, or to prevent an action; for plaintiff can-

not succeed at law. *Hilton v. Barrow*, Vol. I. 284.

5. True way of pleading is to plead facts. *Hilton v. Barrow*, Vol. I. 285.

6. Where a surplus to be distributed is an uncertain sum, the Master ought to report the shares in aliquot parts, not in money. *Attorney General v. Haberdashers' Company*, Vol. I. 295.

7. Defendant stating himself trustee for mortgagees decreed to deliver up deeds, because he did not name them, so that plaintiff could amend. *Earl of Scarborough v. Parker*, Vol. I. 267.

8. Demurrer allowed; the bill not connecting the fraud with the transaction sufficiently. *East India Company v. Henchman*, Vol. I. 287.

9. General charge of combination to defraud too loose. *Ibid*.

10. Charge that defendant was appointed resident at the East India Company's factory at M. not a sufficient charge that he was factor. *Ibid*.

11. Every thing well pleaded is confessed by demurrer. *Ibid*. 289.

12. Defendant to bill for discovery and account objecting by answer, that he had no concern in the business, must answer fully, though such a plea would bar both discovery and relief. But if the fact is so, there cannot be a decree against him. *Cartwright v. Hateley*, Vol. I. 292.

13. Bill by Nabob of the Carnatic v. East India Company for discovery and account of rents and profits of his territories while in their possession as security for debt; and for the balance, submitting to pay it, if against him. Plea, that by divers charters, &c. and statutes confirming them, defendants have sole privilege of trading to India,

a right to send men, ships, &c. to commission officers to conquer or make peace and war, &c. their advantage with any natives Christians; that plaintiff is a sovereign, not a Christian; all the transactions in the bill entered between him as such sovereign and defendants in exercise of privileges; and related to matters transacted between them regard to peace and war, and right and defence of their respective possessions; and therefore are cognizable in this or any municipal court. Plea overruled; and having been once amended, farther refused; and defendants commanded to answer immediately. *Nancy of the Carnatic v. East India Company*, Vol. 1. 371.

Plea to jurisdiction must show error. *Ibid.* 372.

Plea to jurisdiction of all is absurd, because the same as in bar. *Ibid.*

Plea must tender issuable error. *Ibid.* 393.

Plea of statute of frauds a defence to parol variation of contract for a lease: not if it only amounts to waiver of part, or to declaration of trust. *Jordan v. Mains*, Vol. 1. 402.

A speaking demurrer overruled. It is bad also at law. *Edinburgh v. Buchanan*, Vol. 11. 83.

Plea averring in answer to a bill of constructive notice, that defendant's knowledge and belief was no notice disallowed; it is to answer the facts, and the court is to make the construction. *Edwards v. Sanders*, Vol. 11. 187.

Bill prayed that the defendant should state the particulars of his free as heir, and of the births, marriages, deaths, or burials; demurrer allowed. *Ivy v. Nichol*, Vol. 11. 679.

21. Joint and separate demands by the same bill; demurrer allowed. *Harrison v. Hogg*, Vol. 11. 323.

22. Defendant cannot demur, because a feoffment is stated, without stating livery, or a bargain and sale without stating enrolment; they will be intended perfect. *Ibid.*

23. Upon bills by rectors and vicars the defendants may split their titles. *Ibid.* 328.

24. Defendant is not bound by a mistake in his answer, as to the effect of an instrument, when the answer referred to the instrument. *Jones v. Smith*, Vol. 11. 372.

25. Plea of a fine overruled, because no seizin was alleged. *Page v. Lever*, Vol. 11. 450.

26. Bill for account of profits made by breach of trust, and injunction to prevent recovery at law of another sum under the same circumstances: upon the answer coming in, the injunction was dissolved, and the money paid under the action: not necessary to charge that fact by supplemental bill. *Massey v. Davies*, Vol. 11. 317.

27. Where the plaintiff is entitled to the discovery he seeks in support of an action, a prayer for general relief, or for relief that is consequential to the prayer for discovery, as an injunction, will not sustain a demurrer. *Brandon v. Sands*, Vol. 11. 514.

28. Plea to a bill of discovery in support of an action under stat. 9 Anne, c. 14. for money lost at play, by the assignees of the loser, a bankrupt, that the action was not commenced and the bill exhibited within three months, overruled. *Ibid.*

29. Plaintiffs having brought an action against the defendant to recover payments made for insuring lottery tickets, prayed a discovery and account, offering to allow pay-

ments made by the defendant: as the defendant could not have that advantage at law, a demurrer was overruled. *Brandon v. Johnson*, Vol. II. 517.

30. Bill by an annuitant under a will for an account of arrears against two administrators with the will annexed: one pleaded the statute of limitations to so much, as sought satisfaction for the arrears, or so much, as was stated to have accrued due previous to six years before the bill: he also by answer set up an agreement to relinquish the annuity: plea overruled without prejudice to insisting on the same matter by answer. *Higgins v. Crawford*, Vol. II. 571.

31. Bill against bankrupt and assignees charging a fraudulent bankruptcy to defeat the plaintiff's execution, and stating, that under an agreement with the assignees for an arbitration, the plaintiff deposited the goods for sale, the produce to be in trust according to the award, that he had lost his copy, and the assignees had obtained the original from the person with whom it was deposited for the benefit of all parties, and refused inspection, prayed a discovery and injunction: a demurrer by the bankrupt disallowed. *King v. Martin*, Vol. II. 641.

32. Defendant pleaded 40 years' possession without account or admission of any debt to a bill setting up an old mortgage and stating an account settled, and that owing to infancy, coverture, and other disabilities, plaintiffs could not proceed; the plea was allowed. *Blewitt v. Thomas*, Vol. II. 669.

33. Administrator disputing by his answer the foundation of the bill, viz. a balance of accounts against the testator's estate, need not set forth an account of the per-

sonal estate by way of schedule. *Phelips v. Caney*, Vol. IV. 107.

34. A schedule to an answer containing at length a bill of costs, and observations with reference to a bill formerly delivered for the same business, held impertinent: though the bill called upon the defendant to set forth how he computes and makes out his demand, with all the particulars relating thereto, with interrogatories pointed to the particular items, and to a minute comparison of the two bills. *Alsager v. Johnson*, Vol. IV. 217.

35. Plea of a suit depending in the Court of Chancery in Ireland for the same matter overruled. *Lord Dillon v. Alvarez*, Vol. IV. 357.

36. Bill charging that the defendants had got the title deeds and mixed the boundaries, prayed a discovery, possession, and an account: demurrer allowed. *Loker v. Rolle*, Vol. III. 4.

37. Bill stating generally that under some deeds in the custody of the defendants, plaintiff was entitled to some interest in some estates in their possession, prayed a discovery, and delivery of the title deeds, possession of the estates, and an account: demurrer to the whole bill allowed. *Ryves v. Ryves*, Vol. III. 343.

38. The answer need not set forth an account, where the ground, upon which it is prayed, is denied: as where the bill charged a dealing in pictures by commission, and the answer denied that; and stated, that the defendant sold them to the plaintiff in the course of his trade. *Marquis of Donegal v. Stewart*, Vol. III. 446.

39. The office of a pleader is, not to make a case, but to state it fairly according to his instructions. *Wallis v. Duke of Portland*, Vol. III. 501.

40. Forty-six years after a decree

directing, in execution of the trusts of the will, a conveyance in fee to the tenant in tail male, having also the reversion in fee, with consent of the only intermediate remainder-man in tail male, a bill was filed against their devisees; the plaintiffs claiming under an old voluntary grant out of the reversion, the estates tail being spent and no recovery; and praying a discovery and conveyance. A general demurrer was allowed; though the decree and conveyance were stated only by way of pretence, not expressly charged; the whole right as against the defendants being founded on that conveyance. *Fletcher v. Tollet*, Vol. v. 3.

41. Admission of assets prevents the necessity of setting forth the accounts. *Pullen v. Smith*, Vol. v. 21.

42. Bill by the East India Company claiming from a part-owner of a ship, freighted by them, double the sum received by him for the sale of the command, to be paid or allowed under the charter-party and a by-law of the company, one moiety to their use, the other to be paid or returned to the person, who shall give the Company information, and make proof; the deed being, on settling the account, cancelled through ignorance of the fact. Demurrer to the discovery, because it might subject the defendant to penalty, covering not only the direct charge, but also circumstances of mere inducement, as the execution and cancellation of the deed, and of the relief, generally, for want of equity, and for defect of parties, viz. the other part-owners, particularly one, who executed, and the former, was overruled. *East India Company v. Neave*, Vol. v. 173.

Demurrer both to the discovery and relief, if good as to the latter, shall be allowed as to both;

though the plaintiff may be entitled to the discovery. *Ibid.* 185.

43. Demurrer allowed to a bill to have a presentation to a living upon the next avoidance delivered up; charging the defendant with gross misconduct in obtaining it, and in other respects, while a private tutor in the family. *M'Namara v. —*, Vol. v. 824.

44. The interrogating part of a bill is to be construed by the alleging part; and not to be considered more extensive. *Muckleston v. Brown*, Vol. vi. 62.

45. If the plaintiff is not entitled to the relief, though he is entitled to discovery, a general demurrer is good. *Ibid.* 63.

46. Plea covering too much ordered to stand for an answer, with liberty to except. *Jones v. Pengree*, Vol. vi. 580.

47. Plea of the statute of limitations, supported by an answer, ordered to stand for an answer, with liberty to except: the charges of the bill not being sufficiently answered. *Bayley v. Adams*, Vol. vi. 586.

48. Whether the charges of the bill must be met by way of averment in the plea, as well as by the answer, *Quære. Ibid.*

49. Office of a plea in bar at law to confess the right to sue, and avoid it by matter *dehors*: so in this Court in general cases. The excepted cases, where the plea must be supported by an answer. *Ibid.* 594.

50. Variation as to a plea good to the relief, but bad to the discovery. *Street v. Rigby*, Vol. vi. 819.

51. Plea may be good in part and bad in part. Ground of the distinction in that respect between a plea and a demurrer. *Mayor, &c. of London v. Levy*, Vol. viii. 403.

52. If a bill is filed for discovery

and relief, and the plea is held sufficient to bar the relief, it is also to bar the discovery. *Sutton v. Earl of Scarborough*, Vol. ix. 71.

53. Defendant having answered, must answer fully, however he might at first have objected to answer at all. *Taylor v. Milnes*, Vol. xi. 42.

54. After demurrer to the whole bill overruled; defendant cannot put in a demurrer to part without leave of the Court. *Baker v. Mellish*, Vol. xi. 68.

55. A demurrer cannot, as a plea may, be good in part and bad in part. *Ibid.*

56. When a demurrer to the whole bill is allowed, strictly the bill out of Court; but in the discretion of the Court it may set the cause on foot again, even after being dismissed. *Ibid.* 72.

57. Matter in an answer, whatever be the nature of it, if relevant, is not scandalous. *Lord St. John v. Lady St. John*, Vol. xi. 526.

58. Amendment permitted after answer by praying injunction against an executrix suggesting a *devastavit* and collusive sale, but confined to the prayer for injunction, and without prejudice to the plaintiff's taking exceptions to the answer. *Jacob v. Hall*, Vol. xii. 458.

59. Defendant pleading purchase for valuable consideration without notice, must aver that the vendor was seized, and was in possession; which would be satisfied by the possession of the tenant. *Daniels v. Davison*, Vol. xvi. 252.

60. Negative plea to a bill for an account of stone taken from the plaintiff's quarry, under a promise to account, alleging assurances that accounts were kept; plea denying only the promise that the accounts had been kept, overruled. *Jones v. Davis*, Vol. xvi. 262.

61. Plea, filed under an order for

time to answer, regular. *De Minckwits v. Udney*, Vol. xvi. 355.

62. Defendant refusing a full discovery, not by plea or demurrer, but by answer, compelled to make a full answer; and, on motion, to produce books, &c. *Somerville v. Mackay*, Vol. xvi. 382.

63. Negative plea. *Ibid.* 387.

64. A plea (that the original plaintiff, a *feme sole*, married after the suit was instituted, and a settlement was executed, assigning all her right and interest to trustee for her and the issue, by which a supplemental bill became necessary) good in substance, but concluding informally, allowed to be amended. *Merewether v. Mellish*, Vol. xiii. 435.

65. A plea must reduce the defence to a single point, which however may consist of a variety of facts. *Ritchie v. Aylwin*, Vol. xv. 82.

66. *Quere*, Whether a defendant can by answer refuse to give a full answer? *Rowe v. Teed*, Vol. xv. 372.

67. Profert dispensed with where a bond is lost, and relief in equity where security lost. *Mackreth v. Symmons*, Vol. xv. 338. 343.

68. Office of a plea, generally, not to deny the equity, but to bring forward a fact, the result perhaps of a combination of circumstances, which, if true, displaces the equity. *Rowe v. Teed*, Vol. xv. 377.

69. Distinction as to pleading between law and equity; the latter admitting the denial of some fact alleged by the bill, in some instances, with certain averments, as a good plea. *Ibid.*

70. Excepted cases where a party is not bound to answer a particular circumstance, viz. not to criminate himself; the case of a purchaser for valuable consideration. *Ibid.* 378.

71. Generally, the bill and answer should form a record, upon which a complete decree may be obtained. *Ibid.*

72. Demurrer allowed to a supplemental bill, as stating circumstances subsequent not only to the original bill, but to publication: first, as not properly supplemental matter; secondly, as not material. If material, the benefit might be obtained in another shape; perhaps by a special application for the opportunity of examining witnesses, or a bill of discovery; as the object may be discovery only, or also relief; and in that case, that the answer or evidence may be read at the hearing. *Milner v. Lord Harewood*, Vol. xvii. 144.

73. To a bill by an heir against a claim under a devise, for a discovery, and that the witnesses may be examined *de bene esse*, and their testimony recorded, a general demurrer for want of equity being allowed, the defendant was not permitted to demur *ore tenus* as to the examination of witnesses; not being made the subject of demurrer on the record. *Pitts v. Short*, Vol. xvii. 213.

74. General demurrer lies where the plaintiff, though entitled to discovery, is not entitled to relief. *Ibid.* 216.

75. The rule that the plaintiff being entitled to discovery only and not to the relief, a general demurrer lies; does not prevent a demurrer to the relief, giving the discovery. *Todd v. Gee*, Vol. xvii. 273.

76. Demurrer not good in part, and bad in part; therefore going to relief, to which the plaintiff was entitled, overruled generally; the plaintiff, a purchaser, not being barred by a report against the title in another suit, upon a bill against him by the vendors. *Ibid.* 273.

77. Prayer material in constructing charges not direct. *Saxton v. Davis*, Vol. xviii. 80.

78. Plea, supported by answer, which must also contain a denial generally by account. *Morison v. Turnour*, Vol. xviii. 182.

79. Demurrer to so much of a bill as called for a discovery of cases laid before the counsel, and the opinions, overruled, as covering facts material to the plaintiff's case. *Richards v. Jackson*, Vol. xviii. 472.

80. Plea to discovery, that it may subject party to penalties, and also to impeachment by the Commons, is inconsistent, and therefore bad. *Nobkissen v. Hastings*, Vol. ii. 84.

81. Not usual to refuse leave to amend a plea, but party must be tied down to a short time, and when it seemed incapable of amendment; leave given to withdraw and plead *de novo* in a fortnight. *Ibid.*

82. Distinction in declaring for goods bargained and sold, or sold and delivered. *Ex parte M'Gae*, Vol. xix. 609.

PLEDGE.

Lease deposited to secure a debt, depositary decreed to perform the covenant and take an assignment, paying the costs of it, and cannot abandon because being entitled to a legal conveyance, equity will consider him as having it. *Lucas v. Comerford*, Vol. i. 235.

POLITICAL TREATIES.

Political treaties between a foreign state and British subject, acting under chartered rights, under an act of parliament, are not subjects of municipal jurisdiction; a bill founded on such treaties was therefore dis-

missed. *Nabob of Carnatic v. East India Company*, Vol. II. 56.

And see POWER, 8.

PORCTIONS.

See EXONERATION, 13.—FORFEITURE, 1.

POSSESSION.

1. Possession of a house by delivery of the keys. *Guest v. Homfray*, Vol. v. 818.

2. A question upon the rule, "*Possessio Fratris*," &c. depending upon the implication of an estate for life. *Wheldale v. Partidge*, Vol. v. 388.

POST-OBIT SECURITY.

Post-obit security, though not on reasonable terms, may be valid; but on grounds of public policy, strictly examined. *Curling v. Mrs. Townsend*, Vol. XIX. 628.

POWER OF ATTORNEY.

Power of attorney revocable, and in ordinary cases, would not found the jurisdiction for delivering up instruments: but where executed for valuable consideration, this Court would not permit it to be revoked. *Shepherd v. Lutwidge*, Vol. VII. 28.

POWER.

And see VOLUNTARY SETTLEMENT.

1. Devisee of stock for life, with absolute power of appointment, if no children, case referred to the Master, where grounds of suspicion whether a child born or not. *Sculthorpe v. Burgess*, Vol. I. 91.

POWER.

2. *Quere*, Whether the words "*from time to time*" in a power to appoint rents and profits of real, but omitted in the power to appoint the produce of personal, will prevent a sweeping appointment of the whole, the power extending to the whole after death. *Pybus v. Smith*, Vol. I. 190.

3. Testator devised to his wife several houses; to his sisters his money in securities for their lives; then divided his fortune in small legacies; but the legatees to take nothing till the death of his wife and sisters; and made residuary legatees: under the following clause, "I empower my wife to give away at her death 1000*l.*, to A. and B. 100*l.* each, the rest to be disposed of by her will," there is no absolute legacy, but a naked power to the wife: who being dead without any disposition, the objects specified are not entitled. *Bull v. Vardy*, Vol. I. 270.

4. A power must be executed in order to create a charge. *Ibid.* 272.

5. An illusory share may be accounted for by circumstances. *Boyle v. Bishop of Peterborough*, Vol. I. 299.

6. Trustee to appoint cannot appropriate part of the sum appointed to himself; but may recall it into the original fund. *Ibid.* 300.

7. Fund given to A. for life with power of appointment during life, and after death, for want of appointment, over: it is not a vested interest till after death of tenant for life, the power subsisting upon it. *Ibid.* 309.

8. Acts done by subjects under powers given by the country bind the country; as signing of plenipotentiary in its own nature, though that is not now understood to bind till ratification. *Nabob of Carnatic v. East India Company*, Vol. I. 392.

9. Three powers by settlement;

first to husband and wife jointly to raise and appoint 3000*l.*; secondly, to husband alone to raise and appoint 2000*l.*; thirdly, to survivor to raise and appoint such sum as would, with the sum before raised, make 5000*l.* The wife joining in raising 3000*l.* under the joint power for the husband, he covenanted not to charge by the power reserved to him alone, or any other power whatsoever during her life, and so long as the said 3000*l.* should remain unpaid, without her consent. After her death he did by deed poll charge with 2000*l.* more to be paid to his executors for debts, &c. and otherwise in performance of his will, or as he should appoint by it; and died, leaving his second wife executrix, without taking notice by his will of the charge, the deed being found uncanceled. The 2000*l.* held well charged, and went to the executrix by a special appointment. *Earl of Uzbridge v. Bayly*, Vol. I. 499.

Act done under a power in a deed, is as if incorporated in the deed when executed. *Ibid.* 510.

10. An interest under a power is not before execution the estate of the party; and will not pass by general words, nor are they alone sufficient to dispose free from incumbrance. *Blake v. Bunbury*, Vol. I. 525.

11. Father having power to appoint among children, and purchasing the share of one, cannot by appointment entitle himself to more than the share of that child in default of appointment. *Smith v. Lord Camelford*, Vol. II. 714.

12. A power to charge a sum in gross implies a power to give any rate of legal interest, and the rule of Court to give 4*l. per cent.* only applies where no rate is specified by the party having power to fix it. *Lewis v. Freke*, Vol. II. 507.

The reason of the rule of Court is,

that money is generally to be had at that rate, but the rule is not invariable. *Ibid.* 511.

13. Devise of real to be sold, and the produce with the personal to testator's wife for life, with power to appoint a moiety by deed or will with two or more witnesses: the estate was not sold: the wife, having no other real estate, by will with three witnesses gave specific legacies, some described to have been her husband's, and all the rest, residue and remainder, of her estate and effects of what nature or kind soever, and whether real or personal, and all her plate, china, linen, and other utensils, which she should be possessed of, interested in, or entitled to, at her decease; the power is executed by the residuary clause. Evidence of conversations with the person who drew the will, to show that the testatrix had no other real estate, rejected. *Standen v. Standen*, Vol. II. 589.

14. By articles the wife's fortune and an equal sum advanced by the husband were agreed to be settled for the husband for their joint lives; and if he should die first, leaving issue by her, for her for life, after her decease, as to the capital, in such manner as he should appoint, in default of appointment to be divided equally among the issue at twenty-one, with maintenance and survivorship; after marriage in pursuance of the articles an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife, remainder to trustees to preserve, &c. remainder, in case of his death first without issue, to certain uses; remainder, in case of his death first, leaving any child or children, to the wife for life, remainder to all the children in such shares as the husband should

appoint; for want of appointment, equally in tail with cross remainders; remainder to the heirs of the husband. Children only are the objects; and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power; and the doctrine of *cy pres* by giving the child an estate tail is not applicable: but the appointment is void for the excess only; and what is ill appointed goes as in default of appointment. *Bristow v. Warde*, Vol. 11. 336.

15. Testator under a power to appoint among children appointed to the husband of a daughter for life, and if she survived him, to her for life; and having advanced her in marriage, recited that as a reason for giving her a small share: this is not illusory. *Ibid.*

16. 4000*l.* settled on marriage in trust after the decease of the husband and wife to pay among all and every the child and children other than an eldest or only son, at such times and in such proportions, as he or she, or the survivor, should appoint by deed or will; for want of appointment, among such child and children, other than, &c. equally to be divided; if but one, to that one; payable at twenty-one or marriage, or as soon after as the life interests should drop; the shares of any dying before payable in the 4000*l.* or so much as should not be appointed to go to the survivors at the same time. There were four younger children: the marriage settlement of one recited, that she was entitled to 1000*l.* part of this fund; one-fourth of it was appointed to another on his marriage, and to a third 1000*l.* as her share of that portion: the fourth died above twenty-one before his father, who survived his wife, and died without any farther appointment: held, that 3000*l.* was

well appointed, and that the remainder vested in all equally according to the direction for want of appointment. *Wilson v. Piggott*, Vol. 11. 351.

17. Under a power to appoint among all children if part is well appointed to some, leaving a share not illusory, which is afterwards appointed so as entirely to exclude one, the last appointment only is void. *Ibid.* 355.

18. Personal settled on marriage for the husband for life, then for the wife for life, then to and among all and every the children and grand-children or issue in such shares, under such restrictions, at such times, and in such manner, as they or the survivor should appoint by deed or deeds or will: for want of appointment, to all and every the children and grand-children or issue living at the decease of the survivor, equally, payable at twenty-one or marriage; if but one, to that one; provided that in case of no appointment the issue of any children dead should not have a greater share than their parents would have had: issue only are within the power; but in any degree: but an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power; otherwise it is void, even as to such as come *in esse* within those limits: but on marriage of a daughter, interests may be given to her children generally and to the husband. What is ill appointed goes as in default of appointment: but children of a living parent cannot take under the proviso. *Routledge v. Dorril*, Vol. 11. 357.

19. The doctrine of *cy pres* does not apply to personal; therefore where under a power to appoint personal to children or issue an appointment is made to a son for life,

then among all his children; if none, to him, his executors, &c. the limitation to his children being void, because not restrained within the legal bounds, cannot be made good *cy pres*. *Ibid.*

20. Preceding limitations under an appointment being void, subsequent limitations, though within the power, cannot be accelerated, and are void also; though the objects of the prior limitations never come in esse. *Ibid.*

21. Where real estate is under a power of appointment limited in strict settlement, if the children cannot take as purchasers, the intention shall be executed *cy pres* by construing it an estate tail. *Ibid.* 364.

22. Under marriage articles 15,000*l.* was vested in trustees on trust, together with 5000*l.* covenanted by the husband to be paid, to be laid out in land to be settled upon the husband for life; remainder to the wife for life; remainder to the children, subject to such powers, limitations, and provisos, as the husband and wife or the survivor should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust fund in an estate lately purchased by the husband for 16,300*l.* and directing them to deliver the said stock, &c. to him at the price they were at on the day of the purchase; which was done. The wife died. There were two daughters. The father by will reciting the purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention, that the said purchase should be an investment of the trust fund, but that the said fund with its increase should be

taken out of his personal estate, gave 10,000*l.* part of the trust fund, in trust to be laid out in land to be conveyed to one daughter for her life, for separate use; remainder to her children in tail; remainder to the other daughter in fee, for whom he also appointed the residue of the fund; but revoked that by a codicil reciting a portion given on her marriage. Held, first, that grand-children are not objects of the power, but the excess only would be void; secondly, that the fund with its increase was invested in the purchase; thirdly, that there was no appointment of the estate or money due on the covenant; fourthly, the remainders in default of appointment are vested, subject to be divested by appointment, and will take effect as to what is ill appointed or unappointed; fifthly, that the share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied. *Smith v. Lord Camelford*, Vol. 11. 698.

23. Testator gave 1000*l.* stock to a married woman for her separate use, and whenever she should die to be absolutely in her own power to dispose of by will, or writing purporting to be her will, to any person or persons, purpose or purposes, she should think proper; but in case of failure of any such disposition or appointment, to go over: this is not a power, but an absolute gift, qualified only to exclude the husband upon the death of his wife; therefore it passed by general words in her will. *Hales v. Margerum*, Vol. 111. 299.

24. Power not executed by general words in a will. *Langham v. Nenny*, Vol. 111. 467.

Estate given to such uses as A. shall appoint, is a fee. *Ibid.* 470.

25. A power of appointment not executed by a general disposition

by will. *Croft v. Slec*, Vol. iv. 60.

26. Appointment by father and son under a power, of money charged on an estate; that in case the son should survive, it should be applied by him in and towards payment of the debts of the father; and subject thereto the residue, if any, should go and be considered as part of the personal estate of the father; and in case the father should survive, it should go and be paid by him, his executors, &c. in and towards satisfaction of his debts, with a similar provision as to the residue. The father surviving, appointed in favour of another son, for valuable consideration as to part. As to that the decree directed payment under the appointment; the residue to be paid into Court, with liberty to apply; in case of no application within twelve months, to be paid according to the appointment. *Lady Clinton v. Lord Robert Seymour*, Vol. iv. 440.

27. A. having both a power and an interest, the estate being conveyed to such uses as he should appoint, and, in default of appointment, to him in fee, conveys by lease and release, using also words of appointment: the deed operates as a conveyance of his interest, not as an execution of his power; especially if the effect of the latter construction will defeat the object. *Cox v. Chamberlain*, Vol. iv. 631.

28. Power to revoke uses, substituting other estates: *Quere*, Whether a substitution of equitable for legal estates, though a bad execution at law, is sufficient in equity; as where it is done by appointing under a power, and declaring uses upon the appointment; which are consequently mere trusts. *Ibid*.

29. An appointment exceeding the power by a limitation to objects

not within the power, is void as to the excess; as where the power is to appoint to children, and the appointment is to a child for life, and after his decease to his wife and children: but that void limitation shall not defeat a limitation over to an object of the power, in case such child dies without leaving a wife or child surviving. *Crompe v. Barrow*, Vol. iv. 681.

30. Trust in marriage articles to pay certain funds, the property of the wife, to all and every her child and children in such parts, shares, and proportions as she should by will give, &c., and for want of such gift, &c. to all and every her child and children, part and share alike, and for want of such issue over. By her will she gave ten guineas, part of the fund, to her eldest son, declaring, that he was otherwise provided for by the will of his uncle; and the remainder she gave to all her other children, naming them, equally, with survivorship in case of the death of any during minority, and before receipt of his, her, or their shares; and in case of the death of her eldest son before he comes to the possession of his uncle's fortune, she gave her second son only ten guineas. The only provision of the eldest son was a remainder in tail after the life estate of his father, who survived his wife. The Court was of opinion, 1st, That children illegitimate, being born after elopement, and no access, clearly could not take: 2dly, That the share appointed to a child, who died in the life of her mother, lapsed: but the case was determined upon the third point; that under the circumstances, the appointment of ten guineas was illusory, and therefore the whole was void; and the fund was distributed among the surviving children and the repre-

sentative of the deceased child; the interest vesting on the birth, liable to be devested only by appointment. *Vanderzee v. Adom*, Vol. iv. 771.

31. Under a power to appoint to and among several persons, each of the objects must have a part; but a court of law will not enter into the amount of the share appointed. *Ibid.* 785.

32. In equity, an appointment of a very small share is not illusory, if justified by circumstances; as where that object is otherwise provided for. *Ibid.*

33. Power attempted to be executed by invalid instruments, held not executed by the general words of a will containing no reference to it. *MacLeroth v. Bacon*, Vol. v. 159.

34. Power to appoint for the benefit of a married woman and her family would not include the husband in general; but upon the whole will an appointment in his favour was established. *Ibid.*

35. Voluntary bond to pay to and among all such child or children of A. in such parts, &c. as the obligor should, by deed or will, appoint; and for want of appointment, and as to what should be unappointed, to and among all such child or children of A. as might survive the obligor: appointment by will of the whole fund to one of six children established. *Wotten v. Tanner*, Vol. v. 218.

36. Under a power for raising portions for younger children, an appointment by a charge confined to the particular event of four or more, was not extended by implication from general words in a subsequent part of the deed, providing for the case of no appointment. *Mosley v. Mosley*, Vol. v. 248.

37. Implication in a will cannot prevail, unless necessary. *Upton v. Lord Ferrers*, Vol. v. 801.

38. Devise after the death of the devisor's wife: if the devisee is heir, the wife takes for life by implication: otherwise not. *Ibid.* 806.

39. Appointment, giving very small shares to some of the objects, set aside as illusory. *Spencer v. Spencer*, Vol. v. 362.

40. The rule as to illusory appointments not to be applied where a sufficient reason appears upon the face of the appointment: perhaps not between parent and child, if clearly proved. *Ibid.* 368.

41. Covenant to settle an estate in strict settlement; subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions and at such times as he should appoint. The power was held well executed by a will directing a sale and appointing the money. *Long v. Long*, Vol. v. 445.

42. An appointment by a father not illusory, where he gives other provisions to the object excluded. *Ibid.*

43. Power of appointment among three persons, executed by a transfer of one-third to one under an order on petition; stating, that the person having the power was desirous that the fund might be equally divided: that person dying without any farther execution, the Court gave the two remaining thirds respectively to another of the objects, and to the administratrix of the third, who was dead, but had survived the person executing the power. *Fortescue v. Gregor*, Vol. v. 553.

44. Devise in trust to dispose of the premises unto and amongst the devisee's four children, in such manner, shares, &c. as he should by deed or will appoint: one dying in

the life of his father, before appointment, was held entitled to a fourth; the father, after that child's death, having appointed three-fourths to his three surviving children respectively. *Reade v. Reade*, Vol. v. 744.

45. Power of appointment does not prevent the interest vesting subject to be divested. *Ibid.* 748.

46. Difference between land and money subject to a power of appointment. *Ibid.* 749.

47. Under a power to appoint among several objects, each must have a share; and by the rule in equity, as to illusory appointments, a substantial share, unless a good reason appears; as another provision by the person executing the power; not from any other quarter. Under such a power, an appointment of a fund, nearly 1900*l.*, among three children, the objects, 10*l.* to one, 50*l.* to another, and the remainder to the third, all having other provisions *aliunde*, was set aside as illusory. *Kemp v. Kemp*, Vol. v. 849.

48. Power in this Court considered as trusts. *Ibid.* 856.

49. Power to appoint to the use of such child and children, &c.: an appointment to one or more good. *Ibid.* 857.

50. Not now the rule, that under a power to appoint among several objects, they must take equally, unless a good reason appears. *Ibid.* 859.

51. A power to appoint among several objects, well executed at law by giving each a share, however small. *Ibid.* 861.

52. Testatrix gave a fund over which she had a power of appointment, and some specific articles, to trustees, in trust for her residuary legatee after-named; and gave the general residue to A. By a codicil she revoked the bequest of the re-

sidue, and gave it to A. and B. A. was held solely entitled to the fund under the appointment. *Roach v. Haynes*, Vol. vi. 153.

And affirmed on appeal. Vol. viii. 584.

53. Power of appointing real estate well executed by a devise to trustees to sell, and an appointment of the money produced by the sale. *Kenworthy v. Bate*, Vol. vi. 793.

54. Settlement upon such child or children as the father should appoint, his appointment excluding one, established. *Ibid.*

Power to appoint land well executed by a charge. *Ibid.* 797.

55. Power to charge includes a power to sell. *Ibid.*

56. Investment of stock directed in trust to pay the dividends to the testator's son for life; and after his death to transfer part of the capital according to his appointment: an interest for life only, with a power. *Nannock v. Horton*, Vol. vii. 391.

57. Power of appointment not executed by will, having no reference to the power or the subject of it; and the Court will not inquire into the circumstances of the property. *Ibid.*

58. Where a particular limited interest and a power concur, though the latter alone might amount to an absolute gift, they are distinct. *Ibid.* 398.

59. Distinction between a power and absolute property. A power, unless executed, not assets for debts. *Holmes v. Coghill*, Vol. vii. 499.

60. Power executed by will, but afterwards discharged, and a new power created. A subsequent codicil will not, by the mere effect of republishing the will, be an execution of the power. *Ibid.*

61. Though the rule is settled, perhaps with some violation of principle, but with no practical incon-

venience, that equity will aid a defective execution of a power, the want of execution cannot be supplied. *Ibid.*

62. Limitation to such uses as A. shall appoint; and in default of appointment, to him in fee: the fee is in him until appointment. *Maundrell v. Maundrell*, Vol. VII. 583.

63. Settlement, in pursuance of articles, previous to marriage, to convey to the use of the husband for life: remainder to wife for life; remainder upon trust to convey unto and amongst all and every or any of the children, in such parts and proportions; &c. as the husband and wife, or the survivor, should, by deed or writing, with or without power of revocation, or by will appoint: in default of appointment, to the first and other sons in tail male; remainder, subject to trusts that failed, to the heirs of the husband. A joint appointment by deed, subject to a proviso for revocation and re-appointment by the husband and wife and the survivor, well revoked by the wife surviving; and by the same deed, a re-appointment to the daughter and two sons successively for life, with remainders in tail to the grand-children, and the ultimate remainder to the daughter in fee, void for the excess beyond the power, viz. the estates to the grand-children, and the ultimate limitation upon them to the daughter; and the principle of *cy prcs* not applicable; all beyond the life estates of the children, therefore, to go as in default of appointment. *Brudenell v. Elwes*, Vol. VII. 382.

64. Bequest to such of the children of A. as B. shall, by will direct, and in default of such direction, among the children share and share alike. B.'s disposition by will in favour of the children living at her death, established against the

claim of one born afterwards, under the general words. *Paul v. Compston*, Vol. VIII. 375.

65. Power considered as distinguished from trust. This Court cannot execute a mere power; but will execute a trust, which fails by the death of the trustee, or accident. *Brown v. Higgs*, Vol. VIII. 570.

66. Power partaking of the nature and qualities of a trust; so that if not executed by the party, this Court will, to a certain extent, execute it. *Ibid.*

67. Power which, by the will, the party is required to execute as a duty. He is a trustee for the exercise of it; and has no discretion, whether he will exercise it or not. The Court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit he is to execute it. *Ibid.* 574.

68. Power not executed by a general bequest of "my estate and effects;" which will pass only what the testator has an interest in, not what he has an authority over. *Roach v. Haynes*, Vol. VIII. 588.

69. Though to effect the execution of a power by will, a direct reference to the power is not necessary, the intention must distinctly point to the subject of it; as if something is included which the testator had not otherwise than under the power, and part of the will, unless applied to it, would be wholly inoperative. *Bennett v. Aburrow*, Vol. VIII. 609.

70. Bequest to a sister, desiring that at her death she should bequeath to those "of her own family" who should behave well, &c., and the sister, by will, declared that she did not think fit to exercise her power, held to be a trust for the next of kin. *Cruwys v. Colman*, Vol. IX. 319.

71. So a bequest to a testator's "relations," with a power of selection, and that power is not exercised, the property undisposed of will go to the next of kin at the death of the party who had the power. *Ibid.* 325.

72. An appointment of a very small portion of a fund held not to be illusory. *Butcher v. Butcher*, Vol. ix. 382.

73. So the distribution may be unequal, the inequality considerable, and it is not necessary to assign any reason for it, until it becomes such as to render some of the shares illusory. *Ibid.* 398.

74. Instruments must receive the same construction in every Court. *Ibid.* 393.

75. A court of equity may, in the exercise of its particular jurisdiction, supply defects in the execution of a power. *Ibid.* 394.

76. An appointment of 100*l.* out of 2,500*l.* and the residue to the other object of the power, held not illusory. *Box v. Whitehead*, Vol. x. 31.

77. A general power of appointment over the whole estate may subsist in a person who has the fee simple. *Maundrell v. Maundrell*, Vol. x. 264.

78. The fee vests until the execution of the power, and the execution is the limitation of a use under the instrument reserving the power. *Ibid.* 255. 264.

79. The distinction as to the effect of partition upon a devise, is that when there is no purpose beyond partition, it is no revocation; but if in the mode of making it, the deviser conveys to such uses as he shall appoint, and in default of appointment to himself in fee, it is a revocation, because he had limited the power. *Ibid.* 257.

Ground of the distinction. *Ibid.* 264.

80. Where the act can only be done under the authority of a power it is not necessary to recite an intention to execute it. *Ibid.* 257.

81. The distinction between term in gross, and a term to attend the inheritance. *Ibid.* 260.

82. Appointment executed by will among children, and share of one lapsed by death in the father's lifetime, held to go as in default of appointment, notwithstanding a direction by the will, that each receiving a share should release the fund. *Mawkey v. Burgess*, Vol. x. 319.

83. Court will not presume a satisfaction from a different fund, when expressly stated to be in satisfaction of a different interest. *Ibid.* 326.

84. Money ordered to be raised, though the only evidence of the execution of the appointment were recitals in two settlements, the books of a deceased solicitor charging for such execution and an unexecuted engrossed copy of the deed. *Skipwith v. Shirley*, Vol. xi. 64.

85. A power to exchange lands to be settled to the same uses, not well executed by a mere partition of the settled lands, though declared to enure to the uses of the settlement. *M^cQueen v. Farquhar*, Vol. xi. 477.

86. Power given to one who was tenant for life with remainder to his wife for life, to limit the reversion to such children as he should think proper, and he in consideration of natural love, &c., appointed the reversion to his eldest son in fee; and it appeared that the father and mother, together with the son, afterwards by a distinct transaction sold the premises, and the money was paid according to their respective interests. The Court, upon the mere suspicion that it was an exe-

cution of a power for the benefit of the party executing it, refused to act against the title founded on such appointment. Mere suspicion upon opinions on the abstract, &c. will not support an objection to the title by purchase. *Ibid.*

87. Under a power to alter the uses of a conveyance by an instrument, the new use will not arise except under the very circumstances in which it is contracted that it shall arise. *Ibid.* 475.

88. Appointment of 100*l.* among three of the children, and 2,400*l.* (the residue) among the two others, held not illusory. *Moratta v. Louzada*, Vol. xii. 123.

89. So an appointment of 5,500*l.* to one child, 1,100*l.* to another, 500*l.*, the residue, among the others, being seven in number, held to be valid according to the decision. *Dyke v. Sylvester*, Vol. xii. 126.

90. *Quere*, If a power be executed defectively in favour of a stranger, the Court would still supply the defect, and lay hold of the fund for creditors. *Ibid.* Vol. xii. 213.

91. Bequest of all his money, stock, goods, &c., and all personal estate whatsoever, to the sole use of his wife for life at her full, free, and absolute disposal during her life, and from and after her death he gave certain articles and 500*l.* to such persons as his wife by will should appoint, held that the wife took a mere interest for life, and that a bequest by her, by will, "of all my personal estate and all my estate and interest therein," without any reference whatever to the will of her husband or to her power, was not a valid execution of her power. *Bradley v. Westcott*, Vol. xiii. 445.

Where a testator is applying the will to the subject of a power, no reference to the power is necessary. *Ibid.*

So the appointment of an executor is not a nomination of an appointee. *Ibid.*

Distinction between a gift for life with a power of appointing, and a gift indefinitely with a superadded power, in the latter case only the property vests. *Ibid.*

92. A lease made under a power by a party having only a particular estate, not conformable to the power, is not good; but where he has the inheritance with directions only how to execute leases, the legal estate will pass from him. *Attorney-General v. Griffith*, Vol. xiii. 580.

93. As to the reason of supplying a defective execution of a power, or the want of a surrender of copyhold estate for a child, *Quere*. *Finch v. Finch*, Vol. xv. 51.

94. Settlement by a *feme sole*, in contemplation of marriage, of part of her fortune in trust to pay the dividends to herself for her separate use for life, and after her death for her intended husband, and after the death of the survivor to transfer the capital according to her appointment by will; and in case she should die without appointment, and he should be then dead, in trust for her next of kin, their executors, &c. according to the statute of distributions.

An interest for life only in the widow, with a power of disposition by will. *Anderson v. Dawson*, Vol. xv. 532.

95. Equitable jurisdiction upon illusory appointment: discretionary according to the circumstances. *Bax v. Whitbread*, Vol. xvi. 15.

96. Execution of a power of appointment among children and grand-children by giving 100*l.* to one, and 2,400*l.*, the residue of the fund, to the only other object, established under the circumstances; the former being at the time of ap-

pointment an uncertificated bankrupt; and other interests being given to him and his family by the instruments, creating and executing the power. *Ibid.*

97. Joint authority determined by the death of one. *Cole v. Wade*, Vol. xvi. 45.

98. Execution of a power is a limitation of a use which must arise, if at all, at the time of execution, and is as if expressed in the original settlement. *Wright v. Wakeford*, Vol. xvii. 457.

99. Under a power of sale with consent of parties, testified by any writing or writings under their and his hands and seals, and attested by two or more witnesses, the attestation going only to sealing and delivery, held not sufficient, nor a subsequent attestation that they also signed; but a case was directed. *Ibid.* 454.

100. Power to be executed by a deed signed and sealed in the presence of witnesses, and the deed expressed to be so executed, though the attestation appeared to be only to the sealing and delivery; signature in the presence of the witnesses presumed. *Ibid.* 458.

101. Nonconformity of the nature of estates, raised by the execution of a power, to those in the instrument creating it, is not of itself sufficient to reduce the legal effect of the latter instrument by reference to the former. *Wykham v. Wykham*, Vol. xviii. 416.

102. Execution of a power a limitation of a use, not requiring an immediately preceding estate of freehold. *Ibid.*

103. Construction of an instrument, intended to be an execution of a power, with reference to the instrument creating it, as operating to create an estate by way of use, to be put in its proper place; in re-

mainder for instance, the words importing an immediate conveyance; but the excess at law, the legal effect of words in a deed, beyond the occasion and purpose not corrected. *Ibid.* 419.

104. Distinction upon the execution of a power in law and equity, a strict, literal, *i. e.* a due execution, the same in both; but, though void at law, the substantial intention upon meritorious consideration enforced in equity. *Ibid.* 395.

105. Devise subject as to part, to a devise to trustees and their heirs for debts instead of the personal estate, and as to part in mortgages in fee to sons and a daughter, and their respective issue male, in strict settlement, &c.; with power to the sons respectively, when in possession, to convey or appoint all or any part to trustees in trust, by the rents and profits to raise a rent-charge as and for a jointure for any wife or wives for each such wife's natural life only; and also to charge portions by deed, and to lease for twenty-one years. Execution of the power by conveyance to trustees and their heirs, on trust, by the rents and profits to raise and pay a jointure during the wife's natural life only, and charging portions; with covenant for title, and for quiet enjoyment by the trustees, during the natural life only of the wife. As to the estate of the trustees at law, *Quære*, the court of King's Bench certifying, that they took an estate in fee; and the court of Common Pleas, that they took no estate whatsoever. Recovery by tenant in tail, the tenants for life being dead, the mortgages outstanding, the debts unpaid, and the trustees for the jointure not parties; valid as an equitable recovery, if those trustees took a fee, as to the equitable estates, viz. subject to the debts

and mortgages, if an estate for life; and as to the legal estates, if a limitation in a deed can be reduced by implication, the circumstances that the purpose did not require a fee, that it might disturb subsequent estates in the instrument creating the power, and the restraint of the covenant for quiet enjoyment to the wife's life, could not prevail against the legal effect of the limitation to trustees and their heirs. The proper mode of executing such a power in limiting a rent-charge to the wife by way of jointure, secured, if not by the ordinary power of entry and distress by a trust term for ninety-nine years, with a proviso for lessor in payment of the jointure during her life, and all arrears at her death. *Ibid.* 395.

106. Legacy in trust to be laid out in stock: the dividends, as they come due, to A. for life, and after her decease to pay the principal according to her appointment by will or otherwise; with power to her to purchase with it an annuity with the approbation of the trustees, but not to sell it.

A. has an absolute power of disposition; and her bill was held a sufficient indication of her intention to take the whole; making a formal appointment or writing unnecessary. *Irwin v. Farren*, Vol. XIX. 86.

And see *BARON AND FEME*, [C.] 23.

POSSIBILITY.

Possibility, a present interest, and capable of devise. *Perry v. Phelps*, Vol. XVII. 182.

PORTIONS.

And see *LEGACY*, [I.]—SATISFACTION, *passim*.

1. Courts of equity lean against double portions, not in favour of the eldest sons, but of all to take under the limitations. *Blake v. Bunbury*, Vol. I. 525.

2. Settlement on marriage to the use of the husband for life; remainder to trustees for five hundred years in trust after the death of the husband and not before, unless with his consent as therein mentioned, to raise portions for younger children, to be paid in such shares and at such times as the husband and wife should appoint; in default of appointment, to be paid, if but one besides an eldest or only son, 5000*l.*; if two, 6000*l.*; if three, 8000*l.*; and if four or more, 10,000*l.* equally, to be paid respectively at twenty-one, or marriage of daughters if after the age of sixteen, if such times of payment happen after the death of the husband; if in his life, then within twelve months after his decease, and not before, unless with such consent: provided, that if any of such younger children should die before his, her, or their portions should become payable, so that the number should be reduced to less than four; no more should be raised than what would make the whole sum for the portion of the survivor or survivors of such younger children equal to the sum originally limited for the portion or portions of such child or children, if one, two, or three. Three younger children only survived their father: but more than four had attained twenty-one. The sum to be raised is 10,000*l.* *Willis v. Willis*, Vol. III. 51.

3. Portions under a settlement for younger children were increased by the will of the father; there being an express maintenance of 2 *per cent.* upon the original portion, the rule for interest upon the legacies does not apply; but the Court continued

- [G.] EXCEPTIONS—AMENDMENT OF.
- [H.] EXAMINATIONS — PUBLICATION.
- [I.] DISMISSAL—ORDERS TO DISMISS.
- [K.] DECREE.
- [L.] DECREE PRO CONFESSO.
- [M.] HEARING — REHEARING — FARTHER DIRECTIONS.
- [N.] ISSUES.
- [O.] JUDGMENT.
- [P.] COSTS,—SECURITY FOR.
- [Q.] TRIAL—NEW TRIAL.
- [R.] ATTACHMENTS.
- [S.] MOTIONS.
- [T.] MONEY—ORDERS FOR PAYMENT INTO COURT.
- [U.] CERTIFICATE OF COURT.
- [V.] CONTEMPT.

[A.] SERVICE OF PROCESS, &c.

1. After final report of costs, &c. nothing remaining but application of the fund, ordered, that service on the clerks in court of the defendants should be good service, in order to confirm the report, on motion and affidavit, that some lived in the East and West Indies, and others in different parts of this country, though there were only five defendants. *Jackson v. Anonymous*, Vol. 11. 417.

2. Upon an injunction bill to stay proceedings at law, the defendant living abroad, a motion, that service of *subpœna* upon the attorney may be good service, requires an affidavit of merits. *Stephen v. Cini*, Vol. IV. 359.

3. Service of an order of sequestration, *nisi*, upon the clerk in court good; the plaintiff having tried in vain to serve it personally. *Marquis of Lothian v. Garforth*, Vol. v. 113.

4. Service on the defendant's wife ordered to be deemed personal

service on the defendant; and upon that service ordered, that he stand committed for breach of the injunction. *Sir William Pulteney v. Shelton*, Vol. v. 147. 260 (Note).

5. Service by sending a *subpœna* to the defendant under cover to the person, to whom he had directed his letters to be sent, ordered to be good service. *Hunt v. Lever*, Vol. v. 147.

6. Order, that service of *subpœna* to answer the amended bill upon the clerk in court or solicitor may be good service upon the special circumstances; that though he had not been served with a *subpœna*, he had appeared on two motions; that his answer would be very important; that he lived abroad out of the jurisdiction, and would not appear to answer. *Gildenichi v. Charnock*, Vol. vi. 171.

7. Service of *subpœna* upon the father-in-law of an infant good service. *Thompson v. Jones*, Vol. viii. 141.

8. Service of a writ of execution upon the clerk in court not good. *Ellison v. Pickering*, Vol. viii. 319.

9. Where plaintiff seeks satisfaction out of the separate estate of the wife, she must also be served. *Jones v. Harris*, Vol. ix. 488.

10. Where the clerk in court is dead and no other is appointed, the regular course is to serve a *subpœna* to appoint a clerk in court, and when the party avoided service, an order was made that service of such *subpœna* on his solicitor should be deemed good service. *Francklyn v. Colhoun*, Vol. xii. 1.

11. Personal service, in order to fix the party with contempt, dispensed with under circumstances, as where he was present in court when the order was made. *Rider v. Kidder*, Vol. xii. 202.

Or had declared he would not execute the order, and absconded

to avoid it. *De Manneville v. De Manneville*, Vol. XII. 203.

And decree affirmed by the Chancellor. *Ibid.* 206.

12. The affidavit upon which the order, that service upon the attorney shall be good service, is obtained, need not for that purpose state a previous application to the attorney to accept a *subpœna*, and refusal by him. *French v. Roe*, Vol. XIII. 593.

13. Service upon the attorney, the defendant being abroad, only to compel appearance, not for the purpose of a special injunction in the first instance. *Anderson v. Darcy*, Vol. XVIII. 447.

14. Service of copy of an order without producing the original not good, unless that production is waived. *Wallis v. Glynn*, Vol. XIX. 380.

15. *Subpœna* served on Sunday, irregular. Attachment and injunction therefore set aside, before appearance, on entering appearance with the register. *Mackreth v. Nicholson*, 367.

[B.] AFFIDAVITS.

1. *Quære*, Whether affidavit of notice must state positively that the person served acts as clerk in Court, or whether information and belief is sufficient? *McCauley v. Collier*, Vol. I. 141.

2. There is no instance of reading affidavits upon an injunction to restrain the negotiation of a bill of exchange: ground of doing so, in cases of waste, is, that the timber cannot be set up again. *Berkely v. Brymer*, Vol. IX. 355.

3. The rule of courts of law, that all affidavits shall be filed a certain time before the discussion: the practice of this Court otherwise; and preferred notwithstanding the inconvenience. *Ex parte Leicester*, Vol. VI. 432.

4. No instance of this Court taking notice of an affidavit before a justice of peace in Scotland; though the courts, of late, have acted upon affidavits before judges of the superior courts there. *Hyde v. Whitfield*, Vol. XIX. 344.

[C.] ANSWERS — SUFFICIENCY — WANT OF—EFFECT OF.

1. Second answer may be put in, pending exceptions to the first. *Knox v. Symonds*, Vol. I. 87.

And it may be filed at any time before the order to amend, &c. even the moment exceptions are taken. *Ibid.*

Defendant, until a fourth insufficient answer, is entitled to be discharged immediately from the contempt, on putting in a farther answer. *Bailey v. Bailey*, Vol. XI. 151.

2. Order that the six clerk may receive the answer without signature, the defendant having gone abroad and forgot to sign it, the motion being consented to. — v. *Gwillim*, Vol. VI. 285.

3. Under special circumstances, and by consent, the six clerk was directed to receive the answer to a bill of foreclosure, though not signed by the defendant. — v. *Lake*, Vol. VI. 285.

4. In a case of mistake in an answer, it was not allowed to be taken off the file; but an additional answer, giving the explanation, was permitted. *Jennings v. Merton College*, Vol. VIII. 79.

5. A mere denial of combination by answer does not satisfy the undertaking not to demur alone. *Lansdown v. Elderton*, Vol. VIII. 526.

6. Upon an attachment against an infant for want of answer, the proper course is a messenger to bring the infant into Court, to have

a guardian assigned. *Eyles v. Le Gros*, Vol. ix. 12.

7. Where farther time is necessary for an answer, it is more proper to apply by affidavit, than to put in a short or evasive answer. *Semble*, In future, where it can be shown that the answer is a mere delusion, it will be taken off the file. *Tomkin v. Lethbridge*, Vol. ix. 178.

8. But such an answer might satisfy the condition in the order not to demur alone. *Ibid*.

9. An answer evasive upon the face of it, and no explanation from defendant how he can put in no better, is, in future, to be considered a contempt. *Thomas v. Lethbridge*, Vol. ix. 463.

10. A party cannot move upon the same day for the common injunction for want of answer, and for the special injunction to stay trial. *Garlick v. Pearson*, Vol. x. 451.

11. Answer without oath taken without signature, under the circumstances of defendant being abroad, leaving a general power of attorney to a party to act for him in suits, &c. *Bayley v. De Walkiere*, Vol. x. 441.

12. Sequestration for want of answer not granted in the first instance. *Bernal v. Marquis of Donegal*, Vol. xi. 43.

13. An answer argumentative, and not positively averring, held insufficient. *Faulder v. Stuart*, Vol. xi. 296.

Upon such a general charge as to a fact, as the payment of consideration, as entitles the plaintiff to an answer as to all circumstances, it is competent for him to put all questions to enable him to make out that fact, when, where, &c. *Ibid*. 301.

But not as to a distinct subject. *Bullock v. Richardson*, Vol. xi. 376.

14. Answer wrongly entitled by mistake, and so no answer allowed, to be taken off the file, upon a proper one being put in. *Semble*, Upon a mere mistake of names, an answer may be taken off and re-sworn. *Griffiths v. Wood*, Vol. xi. 62.

15. Order to take the answer of defendants out of the jurisdiction, without oath or signature, upon an affidavit by their father that he has authority to act for them. *Harding v. Harding*, Vol. xii. 159.

16. Where defendant was a mere trustee, and in so infirm a state of body and mind as to be incapable of putting in her answer, the Court refused to permit it to be taken without oath or signature; the proper course was to appoint a guardian to put in the answer. *Wilson v. Grace*, Vol. xiv. 172.

17. Upon an answer to an amended bill, merely evasive, referred to the Master to see whether it were substantially an answer or not. *Smith v. Serle*, Vol. xiv. 415.

18. Defendant, in Newgate under a criminal sentence, having been brought up by *Habeas Corpus* for not putting in his answer, and remanded to Newgate as to the farther proceeding, *Quere*. *Lloyd v. Passingham*, Vol. xv. 179.

19. Defendant in confinement under sentence for felony, cannot be brought up by *Habeas Corpus* upon an attachment for want of an answer. *Rogers v. Kirkpatrick*, Vol. iii. 471. 573.

20. After process to a serjeant at arms, issued but not executed, answer and exceptions submitted to by a note between the clerks in Court; but, no farther answer being put in, the serjeant at arms ordered to go. *Waters v. Taylor*, Vol. xvi. 417.

21. Defendant taken upon the process for want of an answer, is,

on putting in an answer, entitled to be discharged without waiting for the report, that it is sufficient. *Lord Shipbrook v. Lord Hinchinbrook*, Vol. xvi. 478.

22. Demurrer and answer after a peremptory order for three weeks farther time to answer, following an order for a month to plead. Answer or demur, not demurring alone, ordered to be taken off the file. *Mann v. King*, Vol. xviii. 297.

23. Order on plaintiff's motion, that defendant shall be at liberty to put in his answer without oath or signature, of course, if defendant is in this country; if abroad, his consent required. *Codner v. Hersey*, Vol. xviii. 468.

24. Affidavits not admitted on motion against the answer, except upon waste; and in a case of partnership, those filed originally with the bill for an injunction, merely as to mismanagement or exclusion, not in support of the title. *Norway v. Rowe*, Vol. xix. 144.

25. The right to process under an undertaking for a serjeant at arms, &c., immediately on exceptions to the report of an insufficient answer disallowed, waived by plaintiff's taking out a *subpœna* for a better answer, and excepting to the report; entitling defendant to eight days after the exceptions are disposed of. *Agar v. Regent's Canal Company*, Vol. xix. 379.

[D.] AMENDMENT.

1. Evidence of a plaintiff being necessary, and defendant refusing to consent to his examination, bill on motion amended by making him a defendant, and replication withdrawn, on the terms of costs, amending defendant's copy, and requiring no further answer. *Motteux v. Mackreith*, Vol. i. 142.

2. Bill amended after answer, costs must be paid for that; then it is considered as an original bill. Plaintiff is not bound by offers in the original bill, nor defendant by submissions in his answer. *Lord Abingdon v. Butler*, Vol. i. 210.

3. On amended bill, it is not necessary to serve new *subpœnas* on the original defendants. *Angerstein v. Clarke*, Vol. i. 250.

Amended bill taken as a new bill for certain purposes. *Ibid.*

4. Amendments moved ought properly to be stated. *Nabob of Carnatic v. East India Company*, Vol. i. 388.

5. After plea set down, order obtained of course by plaintiff to amend the bill, and served on defendant: plaintiff not appearing when the plea came on to be argued, it was allowed of course with costs. *Jennings v. Pearce*, Vol. i. 447.

6. Amended bill is out of Court by allowance of plea posterior to the date of the bill; otherwise if prior. *Ibid.* 448.

7. Motion of course, after plea or demurrer to amend the bill on twenty shillings costs, must state, that the plea or demurrer is not set down. *Ibid.*

8. *Subpœna* not necessary to an amended bill. *Skeffington v. —* Vol. iv. 66.

9. Bill for discovery and delivery of a settlement and other title deeds under which plaintiff claimed, and possession of the estate: demurrer to all the relief and all the discovery, except the settlement for want of equity; and answer admitting the settlement, and offering to produce it, denying that he had any other relative to the plaintiff's title. The title being a legal one, the Court would only order the settlement to be produced at the trial; demurrer

going therefore to all the relief, the defendant had leave to amend. *Renison v. Ashley*, Vol. 11. 459.

10. In case of mistake, the practice now is, to permit a supplemental answer to be put in. Upon an affidavit, stating, that at the time of putting in the answer, the defendant did not know the circumstances upon which he makes the application, or any other circumstances upon which he ought to have stated the fact otherwise. *Wells v. Wood*, Vol. x. 401.

11. Where the bill for an account of captures, according to articles, included the interests of a number of persons, the Court allowed the amendment, stating that the bill was on behalf of plaintiff and all others. *Good v. Blewitt*, Vol. x11. 397.

12. Motion to take off the file for irregularity a plea to a bill, amended under the usual order, after exceptions allowed, refused; as a case for a plea may arise, either from the amendments themselves, or from their effect upon the original part of the bill. *Ritchie v. Aylwin*, Vol. xv. 79.

13. After answer to a bill of discovery, motion to amend the bill by adding a prayer for relief, refused with costs. *Butterworth v. Bailey*, Vol. xv. 358.

14. Order obtained by plaintiff under the usual undertaking to speed his cause, for liberty to withdraw his replication and amend the bill, discharged with costs. *Pitt v. Watts*, Vol. xvi. 126.

[E.] TIME.

1. The Court condemned the practice of allowing as much time of course after an insufficient answer, as on the original one, also as to the

costs of attachments, and proposed a remedy by order. *Anon.* Vol. 11. 270.

2. At the rolls, after insufficient answer, an order for time is obtained on petition, and defendant never gets as much as for the original answer. *Ibid.*

3. Illness an exception to the rule, that an application for time to answer on special grounds must be made in the first instance, before the usual orders obtained. — *v. Riddle*, Vol. xix. 112.

4. Where plaintiff amended, paying the costs of plea, and defendant, after an order for six weeks' time to answer the amended bill, moved for a month's farther time, allowed, the defendant being entitled to the same time as on an original bill. *Spencer v. Bryan*, Vol. ix. 231.

5. Plaintiff in a bill for discovery only, is not entitled, as of course, to two terms to except to the answer filed in the vacation. *Hewart v. Semple*, Vol. v. 86.

6. Demurrer allowed in the Exchequer upon argument, with thirty shillings costs: in another suit in Chancery between the same parties, and to the same effect, it was ordered, on motion, that the defendant should have time to answer till payment of those costs, but without prejudice to an application to dismiss the bill. *Holbrooke v. Cracraft*, Vol. v. 766 (n.)

7. After two answers reported insufficient, the defendant is not entitled to six weeks' time to answer. *Gregor v. Lord Arundel*, Vol. vi. 144.

8. The time allowed for filing exceptions *nunc pro tunc* is two terms and the following vacation. *Thomas v. Lewellyn*, Vol. vi. 823.

9. Defendant submitting to ex-

ceptions is not entitled to further time under the general order, 23d January, 1794; having previously had three orders for time, consenting to a serjeant at arms, as required by that order. *Portier v. De La Cour*, Vol. VIII. 601.

10. After an order obtained for time to answer, defendant cannot answer and demur but upon a special case. *Taylor v. Milner*, Vol. x. 444.

11. If defendant asks and obtains an order for time to plead, answer, or demur, he cannot demur alone; and the mere denial of combination is not a compliance with the terms of that order. *Ibid.* 448.

12. Under circumstances, special order for time to answer made without the usual orders for time having been first made. *Norris v. Kennedy*, Vol. XII. 66.

13. Construction of the general order, 23d January, 1794: defendant, after exceptions allowed, not having previously come under terms, is entitled of course to one order for time. The general order not attaching before the second application for time to answer an amended bill, or after exceptions allowed. *Wells v. Powell*, Vol. XVII. 113.

[F.] REFERENCE AND PROCEEDINGS BEFORE MASTER.

And see ACCOUNT, 16.—SCANDAL.

1. Upon motion, a reference removed from the office of one Master to that of another, it not being proper to go into the business before the former, being incapacitated from age and infirmity. *Anon.* Vol. ix. 341.

2. A reference of an answer for impertinence is waived by a subsequent reference for insufficiency. *Pellew v. —*, Vol. VI. 456.

3. After a reference for insuffi-

ciency, the answer cannot be referred for impertinence. *Ibid.* 458.

4. A reference of an answer for impertinence, is a sufficient cause against a motion for dissolving the injunction; but under the circumstances, the Court imposed the terms of procuring the report within four days. *Goodinge v. Woodhoms*, Vol. XIV. 534.

5. After an order for time to answer, the bill may be referred for scandal, but not for impertinence. *Anonymous*, Vol. v. 656.

6. There may be a motion for a separate report, and for proceedings *de die in diem*. *For v. Mackreith*, Vol. I. 72.

7. The Master may proceed *de die in diem* without an order. *Sturdy v. Lingham*, Vol. v. 423.

8. The Master not only may, but it is his duty to proceed upon references *de die in diem*, if, in the exercise of his discretion, he shall think fit. *Purcell v. M'Namara*, Vol. XI. 362.

9. Upon a motion for a commission to take defendant's examination the time is left to the Master, not limited by the order. *Hairby v. Emmet*, Vol. v. 683.

10. The Master may hear evidence, though not read at the hearing to examine witnesses examined in the cause, there must be an application for leave; but he may examine others to the same points who were not witnesses in the cause, without. *Smith v. Althus*, Vol. XI. 564.

11. The old practice of the other courts of equity, to insert a direction that the Master is to be armed with a power to examine witnesses has been long omitted in Chancery; instead of that the Master may certify that a commission is necessary, and then the commission issues of course. *Sanford v. Biddulph*, Vol. IX. 36.

12. After a decree the Master may examine witnesses; but ought not to do so by his clerk: the same *subpcena* issues as to bring them before the examiner; which is the same as a *subpcena* to answer, but the label expresses the purpose: upon an examination in the country the body of the writ expresses, that it is to testify. *Parkinson v. Ingram*, Vol. III. 603.

13. The decrees in the Exchequer always express, that the Master is to be armed with a commission to examine witnesses and power to direct the same to the country: so formerly in Chancery. *Ibid.* 607.

14. *Quere*, As to the practice of granting the Master's, or six clerk's certificate, that the examination was insufficient, or of no proceeding, &c., whether notice should be given before he grants it? *Wills v. Pugh*, Vol. x. 402.

15. It is not usual when the Master is satisfied that there has been a full production of papers, for him to certify his satisfaction. *Cotton v. Harvey*, Vol. XII. 391.

16. Evidence not to be received by the Master, after he has settled his report. *Thompson v. Lambe*, Vol. VII. 587.

17. Upon an order to bring in books, &c. before the Master within four days, and on default that the serjeant at arms may go against him; before that order is absolute there must be a certificate of the Master of the same date, and it should appear upon the order that there is such certificate. *Carleton v. Smith*, Vol. XIV. 180.

18. Upon a reference to the Master as to the fact of a person's death, the report only stating the circumstances, viz. absence abroad fourteen years without any account of him,

but not drawing the conclusion, it was referred back to the Master to state, whether he was dead at the time when administration was granted; especially as two years more had elapsed since the report. *Lee v. Willock*, Vol. VI. 605.

19. Plea of a former suit depending for the same cause set down by the defendant was struck out: but the plaintiff not having procured a reference to the Master within a month, the bill was upon motion dismissed under the standing order. *Baker v. Bird*, Vol. II. 672.

20. Plea of another suit depending for the same cause referred to the Master of course, without being set down. *Anon.* Vol. I. 484.

21. Reference, whether two suits are for the same matter, is obtained by plea in Chancery as in the Exchequer, not by motion. *Murray v. Shadwell*, Vol. XVII. 353.

22. Before report, the Court refused to order a balance of charge allowed against defendant upon account to be paid in, and of the whole alleged by him in his discharge without any deduction, appearing by the Master's certificate and defendant's examination before him; and also refused to take the certificate off the file. No certificate by a Master, as by the Accountant-General, there must be a report in order to take notice of any thing in the Master's office. *For v. Mackreth*, Vol. I. 68.

23. Interrogatories and depositions not referred for impertinence alone without scandal. *White v. Fussell*, Vol. XIX. 113.

24. Reason of the practice in the Masters' office of receiving the party's affidavit in support of his claim, as a creditor, that he must give that assurance that the debt is due: but, if it is contested, no

attention is given to the affidavit. *Fladong v. Winter*, 196.

25. Exception to the Master's appointment of a receiver disallowed. *Wilkins v. Williams*, Vol. III. 588.

26. After an order for confirming the report *nisi*, filing exceptions, and making the deposit with the register, are no cause to prevent that order being made absolute, unless an order for setting down the exceptions to be argued is obtained; which may be done either by the plaintiff or defendant. The order confirming the report was discharged on payment of costs. *Gildart v. Moss*, Vol. IV. 617.

[G.] EXCEPTIONS—AMENDMENT OF
—AND SUPRA, [E.] 23, 24.

1. Award on general reference not to be impeached by exceptions, but by cross motions to set aside and confirm it. *Knox v. Symmonds*, Vol. I. 369.

2. Exception overruled with costs. *Burnaby v. Griffin*, Vol. III. 266.

3. As to excepting for costs. *Holbecke v. Sylvester*, Vol. VI. 417.

4. Objections to interrogatories settled by the Master must be taken by exceptions, not by petition, as an objection to the appointment of a receiver. *Hughes v. Williams*, Vol. VI. 459.

5. The mere addition of a defendant, no new matter, requiring no farther answer, does not prevent the plaintiff from excepting to the answer. *Taylor v. Wrench*, Vol. IX. 315.

6. Exceptions to the Master's report under a decree made as the rolls may be set down before the Lord Chancellor. *Burdon v. Burdon*, Vol. IX. 499.

7. Exceptions permitted to be

amended upon mistake. *Dolder v. Bank of England*, Vol. X. 284.

8. In answers, a supplemental one is filed, without taking the other off the file. *Ibid.*

9. Where an original bill has been filed and exceptions have been taken to the answer, and the plaintiff moves to amend; if he goes upon the answer as to the original and amended bill, as insufficient, he must go before the Master upon the old exceptions as they apply to the original bill, and upon new exceptions as to the new matter introduced by the amendments; but the Master may give his judgment upon the answer to the amendments with reference to such parts of the original bill as apply to them. *Partridge v. Haycraft*, Vol. XI. 570.

10. If exceptions be taken after answer to them, the plaintiff cannot add to the old exceptions, but must contest whether they be answered, and may refer the answer back upon the old exceptions. *Ibid.* 575.

11. After motion for liberty to amend, and direction that the answer and exceptions shall be answered together, the answer to the exceptions may be made before the order to amend is drawn up. *Ibid.* 578.

12. Exceptions in general terms to the Master's report, that an examination under a decree was sufficient, held regular, but to be discouraged, and therefore, on being overruled, costs beyond the deposit were given. *Purcell v. M'Namara*, Vol. XII. 166.

13. A party cannot except, pending a demurrer, without admitting the validity of the demurrer; but the exceptions having been taken upon a mistake as to the practice, and without any intention of waiving the demurrer, the Court per-

mitted them to be withdrawn on paying the costs, without prejudice. The mode where the amendment is so considerable, as to disfigure the record, is to take it off and put a new record on the file. *Boyd v. Mills*, Vol. XIII. 85.

14. Distinction as to exceptions in the Courts of Chancery and Exchequer. *Ibid.* Vol. xv. 377.

15. Exceptions filed to the Master's report, under a reference in bankruptcy, upon petition for liberty to except. *Ex parte Thistlewood*, Vol. XIX. 236.

[H.] EXAMINATIONS—PUBLICATIONS—AND SUPRA. [E.]

1. Witness examined before decree, but then accidentally and without fraud incompetent, on motion allowed to be generally re-examined after decree: but if competent at first, second examination can be only to matter substantially different. *Sandford v. ———*, Vol. I. 398.

2. Impertinent interrogatories suppressed. *Ibid.* 400.

3. Court refused to admit depositions of a fact, that the defendant was an alien papist, the fact not being in issue. *Clarke v. Turton*, Vol. XI. 240.

4. A written agreement for the purchase of an estate, and whereon a bill for specific performance could be supported, is sufficient to pass an equitable estate by will, and the subsequent conveyance of the legal estate will not operate as a revocation. But where the only evidence of such previous contract was a letter from the testator to his solicitor, merely alluding in general terms "to land bought of A.," held that it was not sufficient. *Rose v. Cunyngame*, Vol. XI. 550.

5. Order on motion of defendant

for examination of plaintiff, saving just exceptions: the plaintiff consenting to be examined. *Walker v. Wingfield*, Vol. xv. 178.

6. Order to examine a party, saving just exceptions, of course on the suggestion of no interest, refused, where an interest appeared. *Anonymous*, Vol. XVIII. 517.

7. Order by one defendant to examine another, not of course after, as before, a decree.

In a special case, to ascertain, which trustee actually received money, all having signed the receipt, the Court refused to discharge the order, made two years before; but required the examination without delay. *Franklyn v. Colquhoun*, Vol. XVI. 218.

8. Defendant in custody for want of his examination discharged immediately on putting it in: but if on reference it proves insufficient, the plaintiff, not having accepted the costs, may proceed from the last process. *Bonus v. Flack*, Vol. XVIII. 287.

9. Answer admitting the execution of an instrument, and craving leave to refer to it, when produced, is not a ground to move for the production; not admitting, that it is in the possession or power of the defendant. *Darwin v. Clarke*, Vol. VIII. 158.

10. After a decree, if the Master sees cause for a commission to examine witnesses in the country, he certifies that it is necessary, and the depositions when returned are filed by the six clerks; but depositions taken before the Master, are kept in their offices. *Parkinson v. Ingram*, Vol. III. 607.

11. Bill by a widow, devisee in fee, impeaching a mortgage by her, while covert, for want of a fine. Answer admitting possession of the

11. and the title under it; alleging the loss of the settlement; stating it differently from the bill, by the addition of a power of revocation and appointment of new uses, by the exercise of which a fine was not necessary.

Production of the will, not being offered by the answer, ordered on motion. *Bird v. Harrison*, Vol. xv. 108.

12. Order upon the register of the Consistory Court to deliver original wills, for the purpose of being produced at the hearing, on security. *Ford v. —*, Vol. vi. 302; and *Hodson v. —*, Vol. vi. 135.

13. The Court refused to permit depositions in the French language to be delivered out for the purpose of being translated. *Fauquier v. Lynte*, Vol. vii. 292.

14. Though the Court orders an original will to be delivered out for a special purpose, as to the jurisdiction, *Quere. Ibid.*

15. To obtain a commission to examine witnesses abroad, it is not necessary to state the points to which it is intended to examine, or the names of the witnesses. *Rougeant v. The Royal Exchange Assurance Company*, Vol. vii. 304.

16. A second commission granted on special circumstances. *Turbot v. —*, Vol. viii. 315.

17. A married woman living in America being entitled to a legacy, a commission to examine her would have been directed; but as she had been examined under a commission issued by the American government, that was considered sufficient. *Campbell v. French*, Vol. iii. 321.

18. Court, under circumstances, made an order for producing the examination of a bankrupt; under a superseded commission, at the hearing of a cause in Ireland; such mo-

tion not of course. *Ex parte Bernal*, Vol. xi. 557.

19. Re-examination of a witness, before publication, upon a recent application, and that the witness had, upon mistake of the day, submitted to examination without looking at papers, &c. *Kirk v. Kirk*, Vol. xiii. 280.

So to correct a mistake, but confined to that. *Ibid.* 285.

Order to transfer stock made without a reference, where the party admitted by counsel that a former order had not been obeyed. *Rider v. Kidder*, Vol. xiii. 123.

20. Order, after verdict upon an issue, to examine *de bene esse* a witness above seventy; suggesting an intention to move for a new trial. *Anonymous*, Vol. vi. 573.

21. Motion to examine witnesses *de bene esse*, except in certain cases, as upon the ground of age, requires notice. The affidavit must be either that the witness is of the age of seventy, or the only witness to the particular fact; or, if upon the ground of health in a dangerous state. *Bellamy v. Jones*, Vol. viii. 31.

22. Examination *de bene esse* would have been granted in a question of legitimacy, where the knowledge of circumstances was in many parties, and the defendant an infant kept out of the way. The course adopted was, to bring the infant into Court and assign one of the Six Clerks as his guardian, to put in an answer for him. *Shelley v. —*, Vol. xiii. 56.

23. The rule, on motion for examinations *de bene esse*, requires it to be shown, that the particular person, and no one else, knows the fact; an affidavit by the agent that he is informed by the witness, that he can prove the fact, and the

belief by the agent that no one else can prove it, held insufficient. *Rowe v. —*, Vol. XIII. 26.

24. After publication, examination of a witness confined only to credit, or to facts not material to the issue. *Carlos v. Brook*, Vol. x. 49.

It is not competent at law to ask the grounds of a witness's opinion, that another is not to be believed on his oath. *Ibid.*

25. An examination to the credit of a witness cannot be had without a special order, upon application to the court, and notice to the party. *Mill v. Mill*, Vol. XII. 407.

26. Witnesses who had been examined in the cause, and re-examined by the Master upon interrogatories, order obtained subsequently, the Court directed the fact of their having been examined without previous order obtained, to be specially stated. *Grenaway v. Adams*, Vol. XIII. 360.

27. Court refused to suppress depositions after publication, and after the cause had been called on, merely on the ground of the commissioners being connected, and having similar interests with the defendants; commissioners taking depositions having discretion in receiving what is and what is not legal evidence. *Whitlock v. Baker*, Vol. XIII. 511.

28. After answer, not of course to enlarge publication, until answer to a cross bill. *Dalton v. Carr*, Vol. XVI. 93.

29. Motion to enlarge publication in the original cause until answer to a cross bill, the original cause being set down for hearing, and the cross bill filed after rules for passing publication, refused with costs. *Cook v. Broomhead*, Vol. XVI. 133.

30. After publication passed liberty given to exhibit articles, as

to the credit of a witness, who had been cross-examined, by general interrogatories, and as to such particular facts only as are not material to what is in issue in the cause. *Purcell v. M'Namara*, Vol. VIII. 324.

31. Order made to re-examine a witness, after publication, as to credit, by general interrogatories, and as to such particular facts only as are not material to what is in issue. *Wood v. Hammerton*, Vol. IX. 145.

32. After publication, order for examination, by general interrogatories, as to the credit of a witness in the cause, and as to such particular facts only as are not material to the issue; but, publication having passed five months, not to delay the hearing. The Court does not previously consider whether the subject of the examination is material to the issue; but in that case will suppress the depositions. *White v. Fussell*, Vol. XIX. 127.

33. Examination to credit, after publication, where the witnesses are in the country, by commission, on articles exhibited by one of the Six Clerks. *Ibid.* 127.

34. After defendant's examination on interrogatories, and motion for payment into Court on that examination, plaintiff permitted to file farther interrogatories. *Hatch v. —*, Vol. XIX. 116.

35. Practice settled to move on examination admitting money due for payment into Court, before the cause is set down for further directions. *Ibid.* 117.

36. For the purpose of commitment, under a short order to pay money, the person serving the order must have an authority to receive the money. *Wilkins v. Stevens*, Vol. XIX. 117.

37. After examination under decree before the Master, concluded

and made known, farther examination not permitted without an order, on surprise clearly established. *Willan v. Willan*, Vol. xix. 590.

38. Waiver of irregularity, by examining before the Master without a previous state of facts. *Ibid.*

39. After publication, no farther examination without leave, not obtained without great difficulty, and generally confined to some particular facts. Vol. xix. 592.

40. Under decree, directing inquiries, the Master cannot, without an order, examine a witness who has been examined in chief in the cause. *Ibid.*

41. The Master armed by decree expressly with power of examining the parties, as he shall think fit; and therefore he can examine a defendant whom he had before examined. *Ibid.* 593.

42. Interrogatories to examine parties must be settled by the Master. As to witnesses, *Quere*: many special orders for that purpose. *Ibid.*

43. Affidavits before the Master by consent. *Ibid.*

44. Depositions before the Master not to be known by the parties, until the whole examination is concluded. *Ibid.*

45. Interrogatories for the examination of a party settled by the Master. *Ibid.* 598.

46. Protection generally, in every stage of the proceedings, against answering any question having a direct tendency to criminate the party, or subject him to penalty, &c., or forming one step towards it. *Paxton v. Douglas*, Vol. xix. 225.

[I.] DISMISSAL—ORDERS TO DISMISS.—And see ACCOUNT, 15.

1. Plaintiff can in no case dismiss his bill without costs: with costs, it is of course; but after motion to dis-

miss without costs refused, consent is necessary. *Dixon v. Parks*, Vol. i. 402.

2. Plaintiff cannot, on motion, dismiss his bill without costs, on the ground that the Court would have decreed according to it, unless consent. *Anon.* Vol. i. 140.

3. The Court refused to dismiss a bill, after a decree for account, with the usual direction for creditors, upon an arrangement among them; but the object might be obtained, as to the disposition of funds in Court, upon farther directions; and, whilst that is in Court, creditors may be let in, although the time has elapsed. *Lashley v. Hogg*, Vol. xi. 602.

4. One co-plaintiff may have the bill dismissed, as to himself, with costs, without consent of the other. *Langdale v. Langdale*, Vol. xiii. 167.

5. General demurrer put in, but never argued, and no proceedings afterwards; the defendant cannot have the bill dismissed for want of prosecution, as he had an equal power to move. *Anon.* Vol. ix. 287.

6. It is not a necessary consequence, that the bill will not be dismissed, because it has been retained for the purpose of a trial at law. *Harwood v. Oglander*, Vol. vi. 225.

7. One defendant, in strict practice, is entitled to dismiss the bill for want of prosecution, though the other defendant stands out in contempt, and it cannot be of any use to go to the hearing without him; and plaintiff was put under the usual terms to speed the cause. *Anon.* Vol. ix. 512.

8. On motion to dismiss bill with costs, for want of prosecution; notwithstanding the bankruptcy of defendant; held that the plaintiff must either dismiss and go in under the

bankruptcy, or go on, making the assignees parties. *Monteith v. Taylor*, Vol. ix. 615.

9. No advantage can be taken of special circumstances, in answer to the application to dismiss for want of prosecution, but only the usual undertaking to speed can be given. Special circumstances must be the ground of a special application. *Lyon v. Dumbell*, Vol. xi. 608.

10. After a decree, directing farther inquiries, an order to dismiss the bill with costs being allowed by mutual consent, such order as could be made, upon farther directions. *Anon.* Vol. xi. 169.

11. Court refused to discharge an order to dismiss for want of prosecution, as irregular, merely on the ground that the certificate of the Six Clerk appeared, on the face of the order, to be of a subsequent date. *M^cMahon v. Sisson*, Vol. xii. 465.

12. The only answer to a motion to dismiss for want of prosecution, is the usual undertaking to speed; any special ground must be the subject of a special application. *Bligh v. —*, Vol. xiii. 455.

13. Where plaintiff obtained an order to amend, after notice of motion to dismiss, but before the defendant could move, held that he was in time. *White v. Hall*, Vol. xiv. 208.

14. Where an order to dismiss was not obtained in time, upon a misrepresentation that a replication had been filed, but was afterwards obtained, the Court refused to discharge it, but upon the parties paying the costs by whom the misrepresentation had been made. *Anon.* Vol. xiv. 492.

15. Upon motion to dismiss for want of prosecution, objection to it, until costs of previous notices are paid, cannot be made until the

fourth. *Anderson v. Palmer*, Vol. xiv. 15.

16. Though generally a party cannot be heard until he has cleared his contempt, a step, taken by the other party, waives the contempt for all purposes, except the right to costs; as costs in the cause; not to be obtained by process of contempt.

Acceptance of the answer, therefore, a waiver of the contempt, for the purpose of enabling the defendant to dismiss the bill for want of prosecution. *Anon.* Vol. xv. 174.

17. Order, dismissing the bill for want of prosecution, after three terms, without replication, of course without notice; and not discharged upon special circumstances, except on payment of costs. *Jackson v. Purnell*, Vol. xvi. 204.

18. Order to dismiss the bill for want of prosecution, after three terms without replication, of course without notice; and pending an injunction, staying execution. *Naylor v. Taylor*, Vol. xvi. 127.

19. Order, dismissing a bill for want of prosecution, after three terms expired without any step taken, obtained, upon motion of course; not requiring notice. *De-graves v. Lane*, Vol. xv. 291.

[K.] DECREE.—See Tit. DECREE.
—And see LACHES, 8.

1. New plaintiff by supplemental bill may impeach a decree upon rehearing, on petition of former parties. *Hill v. Chapman*, Vol. i. 405.

2. Order made, on motion, to correct a decree in what is clearly a mistake. *Newhouse v. Mitford*, Vol. xii. 456.

But it must be done by a separate supplemental order. *Lane v. Hobbs*, *Ibid.* 458.

3. A decree cannot be impeached collaterally in another cause. *Lady Clinton v. Lord Robert Seymour*, Vol. IV. 440.

4. A rehearing is the proper mode of impeaching a decree not signed and enrolled for error. *Bolger v. Mackell*, Vol. V. 509.

5. Where a decree had been acted upon by reports, and been recited in an order on farther directions, but the original could not be found, the Court allowed it to be drawn up from the office copy, and entered *nunc-pro tunc*. *Donne v. Lewis*, Vol. XI. 601.

6. In equity against the answer there can be no decree upon the testimony of a single witness, unless supported by special circumstances. *Cooth v. Jackson*, Vol. VI. 40.

7. A single witness cannot prevail against a positive denial by the answer. *Lord Cranstown v. Johnston*, Vol. III. 170.

8. Decree against defendant under circumstances, upon the evidence of a single witness, notwithstanding a positive denial by the answer, with costs. Principle of the rule, upon which the Court acted, that being willing to pronounce upon the question, whether the circumstances outweighed the effect of the rule, that there shall be no decree, upon the evidence of a single witness, against a positive denial by answer, the defendant might, at his peril, withdraw it from the Court, and have an issue, which he declined. *East India Company v. Donald*, Vol. IX. 284.

9. Decree for an equitable creditor is equal to a judgment at law. *Gray v. Chiswell*, Vol. XI. 125.

10. Under decree for account of proceeds of a joint adventure, on bill by one party on behalf of himself and the others, and inquiry, who are concerned with the plaintiff, the Master having by advertisement, as

usual, declared those who should not come in, excluded, reported several persons, who had not come in to claim, entitled to shares. Farther advertisements directed: but payment into Court of those shares refused; and the decree not to be executed as to those who should not come in. *Good v. Blewitt*, Vol. XIX. 336.

11. To show cause against a decree on default by defendant at the hearing, the order must be to set down the cause on some day immediately, not after the causes already set down. *Margravine of Anspach v. Noel*, Vol. XIX. 573.

[L.] DECREE PRO CONFESSO.

1. Where there is only one defendant, after all the process of contempt, for want of an answer the bill may be ordered to be taken *pro confesso*, upon motion. *Seagrave v. Edwards*, Vol. III. 372.

2. Information decreed to be taken *pro confesso* upon two insufficient answers. *Attorney General v. Young*, Vol. III. 209.

3. Where the bill is amended after answer, if the amended bill is not answered, the plaintiff is entitled to a decree, that the bill be taken *pro confesso* generally. *Jopling v. Stuart*, Vol. IV. 619.

4. An insufficient answer is no answer; and therefore shall not prevent a decree to take the bill *pro confesso*. *Turner v. Turner*, Vol. IV. 619.

5. Bill amended after answer, may be taken *pro confesso* generally, not as to the amendments only; the record being entire. *Bacon v. Griffiths*, Vol. IV. 619.

6. The Master of the Rolls refused to make an order, under the statute 5 Geo. 2. c. 2. for the purpose of having the bill taken *pro*

confesso, without an affidavit, according to the eighth section, that defendant had been in England within two years before the subpoena issued. *Neale v. Norris*, Vol. v. 1.

7. To obtain an order for taking the bill *pro confesso*, under the statute 5 Geo. 2. c. 25. the affidavit must state, that the defendant has been in England within two years before the subpoena. *Bishop of Winchester v. Beavor*, Vol. v. 113.

8. Decree upon a bill taken *pro confesso* is to be pronounced by the Court, not to be drawn up by the plaintiff. *Geary v. Sheridan*, Vol. VIII. 192.

9. No decree *pro confesso* can be taken, after certificate and an answer filed; but there should be a receipt given for costs. Plaintiff cannot, however, treat the answer as a nullity after having taken an office copy. *Sidgier v. Tyte*, Vol. XI. 202.

10. An order having been obtained to take the bill *pro confesso*, the Court, upon motion to discharge that order, required to see the answer proposed to be put in. *Hearne v. Ogilvie*, Vol. XI. 77.

11. A decree taken *pro confesso*, in the ordinary course, like any other cause, cannot be impeached collaterally, but only by a bill of review, or a bill to set it aside for fraud. *Ogilvie v. Hearne*, Vol. XIII. 563.

[M.] HEARING.—REHEARING.— FARTHER DIRECTIONS.

1. Court refused petition to set down cause for farther directions or order, though the parties could not proceed, an inquiry before the Master being rendered useless by the event of a verdict, and farther directions had been reserved until after trial and report. *Dixon v. Olmius*, Vol. I. 153.

2. Plaintiff may except to the

report, and at the same time set down the cause for farther directions. *Y v. Frere*. *Bowerbank v. Colassee*, Vol. v. 424.

3. Upon farther directions a question decided by the Master was opened, without any exception; all the circumstances appearing on the report. *Adams v. Claxton*, Vol. VI. 226.

4. A cause may be set down for farther directions, or upon the equity reserved, before a different judge than the one who heard it originally. *Pemberton v. Pemberton*, Vol. XI. 58.

5. After a decree *nisi*, the party not appearing, yet allowed to be reheard on terms. *Vowles v. Young*, Vol. IX. 172.

6. Order of a preceding Lord Chancellor not to be reheard upon minutes; but must first be drawn up. *Taylor v. Popham*, Vol. XV. 72.

7. Practice, after a decision by one Court, instead of rehearing or appealing, to institute a suit in another Court for the same object, disapproved. *Reynolds v. Pitt*, Vol. XIX. 134.

[N.] ISSUES.

1. An issue directed, the original answer not sent down to the trial, whether between the same parties or not, till after the office copies have been refused as evidence. *Anon.* Vol. I. 152.

2. Upon the question as to the amount of a legacy, from a doubt as to a figure, an issue was directed instead of a reference to the Master. *Norman v. Morrell*, Vol. IV. 769.

3. Issue, whether an instrument was obtained by fraud, &c. not directed on motion after answer, as where the decree depends upon a simple fact, viz. legitimacy or competence, according to the present practice to refer a title on motion. *Fullagar v. Clark*, Vol. XVIII. 481.

4. Distinction between taking the opinion of a court of law conclusively, and directing an issue for the satisfaction of this Court, reserving to itself the review of what passed at law with reference to the record in equity. *Beotle v. Blundell*, Vol. XIX. 500.

[O.] JUDGMENTS.

1. The Court cannot decree against a title in the crown apparent on the record, though not insisted on at the hearing. *Barclay v. Russell*, Vol. III. 424.

2. A court of law could not give judgment against the title of the crown appearing on the record. *Ibid.* 436.

3. Death of a defendant does not necessarily prevent judgment. *Davies v. Davies*, Vol. IX. 461.

4. The defendant dying after service of the *subpcena* to hear judgment, whether upon a bill of revivor a new *subpcena* to hear judgment is necessary, *Quere.* *Byne v. Potter*, Vol. V. 305.

5. Plaintiff, under an undertaking to speed his cause, obtained an order to withdraw his replication, and set down on bill and answer; but did not serve a *subpcena* to hear judgment, or appear when the cause was called.

The bill was dismissed with costs. *Rogers v. Goore*, Vol. XVII. 130.

6. Service of *subpcena* to hear judgment necessary, though the cause was set down under the order upon a peremptory undertaking to speed the cause. *Dixon v. Shum*, Vol. XVIII. 520.

[P.] COSTS.—SECURITY FOR.

And see title COSTS, *passim*.

1. To entitle defendant to security for costs it is not sufficient, that plaintiff appears by the bill to be out of the jurisdiction: he must ap-

pear to be resident abroad: then it is of course. *Green v. Charnock*, Vol. I. 396.

2. But where party was directed under the Alien Act to remove, security ordered. *Seilax v. Hanson*, Vol. V. 261.

3. Where a cause is heard on bill and answer, only forty shillings costs on dismissing the bill, unless a special case. *Bayly v. the Corporation of Leominster*, Vol. I. 476.

4. The bill praying discovery and a commission, the defendant cannot have the costs of discovery till the return of the commission. *Anonymous*, Vol. VIII. 69.

Rule, that if the defendant to a bill for discovery and a commission examines in chief, instead of confining himself to cross-examination, he shall not have costs. *Ibid.* 70.

5. No costs upon a notice of motion abandoned till after the third time. *Shelly v. Shelly*, Vol. VIII. 316.

6. Under a joint order for costs, one party absconded, and was never served. A proceeding against the other good. *Ex parte Bishop*, Vol. VIII. 333.

7. Plaintiff pays costs upon a bill of discovery. *Simmons v. Lord Kinnaird*, Vol. IV. 742.

8. The proper time to move for costs of the discovery is after the commission returned. *Banbury v. —*, Vol. IX. 103.

9. The proper course for costs is by petition, and not by exceptions. *Lucas v. Temple*, Vol. IX. 299.

10. Plaintiff submitted after demurrer set down to be argued 5l. costs allowed, and the bill amended. *Anonymous*, Vol. IX. 221.

11. Where a question arises between the individual and the person taking the bulk of the estate, upon the interest in a trust fund separated from the residue, the costs must come out of the particular fund. Where the decree was corrected in

that respect being considered as part of the relief prayed, held not within the rule of appeal for costs only. *Jenour v. Jenour*, Vol. x. 572.

12. No revivor for costs alone, unless to be paid out of an estate. *Ibid.*

13. Charges of a sale to be taxed under the head of just allowances, not of costs. *Crump v. Baker*, Vol. xviii. 285.

14. Costs not given on a motion, unless mentioned in the notice. *Mann v. King*, Vol. xviii. 297.

15. The simple fact, that the plaintiff is gone abroad is not a sufficient ground to compel him to give security for costs. *Hoby v. Hitchcock*, Vol. v. 699.

16. Order to strike out the names of two of the plaintiffs on giving security for costs made without consent. *Lloyd v. Makeam*, Vol. vi. 145.

17. No order, that a plaintiff residing abroad shall give security for costs, where there are co-plaintiffs residing in England. *Walker v. Easterby*, Vol. vi. 612.

18. Where defendant has obtained an order for time, or taken any step, he cannot have security for costs. *Anon.* Vol. x. 287.

So at law. *Ibid.*

19. Order for taxing a bill of costs, where obtained by a party in the cause, to be entitled in the cause: where by a stranger, under the statute, to be entitled *ex parte*; but proceeding under such an order would be a waiver of the irregularity. *Bignol v. Bignol*, Vol. xi. 328.

[Q.] TRIAL—NEW TRIAL.

And see FRAUD, 9.

1. After injunction dissolved upon the merits, motion to stay trial of ejectment until full answer to the amended bill refused, with costs. *Lady Markham v. Dickenson*, Vol. i. 30.

2. Different practice of the Courts

of King's Bench and Common Pleas as to putting off a trial in the absence of a witness: the former being satisfied with the affidavit, that the party cannot safely go to trial without the evidence, the latter requiring the reason. *Franklyn v. Colquhoun*, Vol. xv. 222.

3. Upon second verdict for the same party as the first, but for a less sum; the last sum recovered, and costs of the last trial, are to be paid out of money in Court upon an injunction to stay execution; the costs of which are to be returned. *Waddle v. Johnson*, Vol. i. 30.

4. After verdict an issue directed, new trial on account of further evidence refused, there being no fraud or surprise but the evidence been kept back by the party applying, although the Court dissatisfied with the verdict. *Standen v. Edwards*, Vol. i. 133.

5. Three trials frequent, and a fourth has been granted: after three ejectments tried in Ireland, an issue was directed between the same parties upon the same point. Upon appeal to the House of Lords a new trial was afterwards granted, and after that another ejectment tried. *Lord Sherborne v. Naper*, Vol. iv. 206.

6. There is no question of civil right, that, in the ordinary course of the jurisdiction of the country, may not go through three inquiries. *Ibid.* 207.

7. In criminal cases, a repeated inquiry is not matter of right but of discretion, and can only be had with consent of the Attorney-General. *Ibid.*

8. An issue having been directed at the Rolls, the motion for a new trial may, if insisted on, be made before the Chancellor. *Pemberton v. Pemberton*, Vol. xi. 50.

9. Upon such motion Court may look not only at the report, but also

at the record of the suit in equity, and is at liberty to refuse; if satisfied that substantial justice has been done, though some of the evidence was improperly rejected. *Ib.*

10. After three verdicts one way and the Court satisfied, rule for a new trial refused. S. C. Vol. XIII. 290.

11. Upon a motion for a new trial for excessive damages the court of law would take care, that the right of the plaintiff should not be prejudiced by the death of the defendant. *Pulteney v. Warren*, Vol. VI. 90.

12. No new trial upon the improper rejection of evidence, if the Court, judging upon the whole record, is satisfied, that the verdict is right. *Bootle v. Blundell*, Vol. XIX. 503.

[R.] ATTACHMENTS.

1. Return to an attachment for want of appearance "*cepi corpus*," but from illness and infirmity she could not be removed; a messenger ordered. *Miles v. Lingham*, Vol. VII. 230.

2. Sequestration for not performing the decree upon the return to an attachment, that the defendant was in custody of the warden of the Fleet. *Errington v. Ward*, Vol. VIII. 314.

3. The practice of issuing an attachment without an affidavit previously filed, in opposition to orders of the Court, to be corrected in future. *Broomhead v. Smith*, Vol. VIII. 357.

4. Sheriff ordered to pay to the party money under an attachment for not paying costs, with costs of the application. *Anonymous*, Vol. XI. 170.

5. Attachment on service of *subpoena* in Scotland. *Shaw v. Lindsay*, Vol. XVIII. 496.

[S.] MOTIONS.

And see *supra*, [N.] 5.

1. Decretal order cannot be discharged upon motion, though made by consent and surprise alleged. *Anonymous*, Vol. I. 93.

2. Point argued by leave of Court, on motion to vary the minutes. *Perry v. Philips*, Vol. I. 251.

3. Defendant, on motion, ordered to pay in a balance ascertained by the report. *Gordon v. Rothley*, Vol. III. 572.

4. Motion to amend depositions after publication refused. *Ingram v. Mitchell*, Vol. V. 297.

5. Notice of motion on Saturday must be given for Tuesday, not Monday. *Maxwell v. Phillips*, Vol. VI. 146.

6. Where the bill seeks relief as well as discovery, the Court will not upon motion aid the plaintiff in proceeding at law without the authority and control of the Court; any such proceeding must be under a decree. Therefore in such a case a motion, that the defendant should produce deeds, &c. at the trial of an ejectment, was refused. *Aston v. Lord Exeter*, Vol. VI. 288.

7. Where the bill seeks relief as well as discovery, the Court will not upon motion aid the plaintiff in proceeding at law without the authority and control of the Court: any such proceeding must be under the authority and control of the Court. Therefore in such a case the Court would not on motion order, that an outstanding term should not be set up by the defendant against an ejectment brought by the plaintiff. *Hylton v. Morgan*, Vol. VI. 294.

8. Motion under special circumstances upon affidavit before answer to restrain proceeding under a

judgment refused. *Lane v. Williams*, Vol. vi. 798.

9. Money may be ordered into Court on motion, upon the ground of admission. *Mills v. Hanson*, Vol. viii. 69.

10. Motion under special circumstances, upon affidavit before answer, to restrain proceeding under a judgment refused. *Lane v. Williams*, Vol. vi. 798.

11. Order to amend, not served or drawn up, does not prevent motion to dismiss the bill for want of prosecution. *Anonymous*, Vol. vii. 222.

12. An omission in a decree, if perfectly of course, supplied on motion; viz. in the usual decree upon a creditor's bill against executors the direction for an account of the personal estate. *Pickard v. Mattheson*, Vol. vii. 293.

13. Motion by defendant for inspection of letters, referred to by the plaintiff's depositions, as exhibits, refused, with costs. *Wiley v. Pistor*, Vol. vii. 411.

14. No objection to a motion, that the affidavit was filed only the day before; if it is an affidavit, that cannot be answered; as, that the plaintiff cannot go to trial with safety, till the answer comes in. *Jones v. —*, Vol. viii. 46.

15. Where a decree directed an inquiry, but was not pursued for many years; the Court refused to interfere upon motion or petition, the party making the application not being born at the date of the decree, afterwards made a party but several years before the application, the relief sought by analogy to the statute of limitations being the fitter subject for a bill. *Lord Shipbrook v. Lord Hinchbrook*, Vol. xiii. 387.

16. Distinction between motion

and petition, as to carrying decrees and orders into effect.

17. An infant suitor is bound by laches in the suit. *Ibid.* 396.

18. Motion not to be postponed where it affects the right of notice. *Coffin v. Cooper*, Vol. xi. 600.

19. The object of the bill being to set aside deeds, the Court will not, on motion, go beyond the usual liberty to inspect, &c. and for production at the hearing, by an order to deposit them with the Master for safe custody, without a special case; establishing danger, that they may not be produced. Therefore, where most of the circumstances, relied upon, viz. variations in two deeds, appeared upon the answer, the order was limited to production at the hearing. *Beckford v. Wildman*, Vol. xvi. 438.

20. Petition failing as to the principal objects, dismissed generally. *Ex parte Ross*, Vol. xvii. 376.

21. Order on a peremptory undertaking to speed the cause entered *nunc pro tunc* of course, on motion without notice above two years afterwards. *Dixon v. Shum*, Vol. xviii. 520.

[T.] MONEY, ORDERS FOR PAYMENT INTO COURT.

1. The Court will not keep money after the party is entitled to it, even at his request. *Isaac v. Gomperts*, Vol. i. 44.

2. An order to pay dividends to trustees, or *one* of them, made under circumstances. *Shortbridge's case*, Vol. xii. 28.

3. A motion cannot be granted for payment of money into Court by defendant upon the account as made out by the plaintiff, even upon the defendant's schedule, when the defendant upon his examination did not admit that nothing was due to

him. The result of the schedule ascertaining such amount must be verified by affidavit. *Quarrell v. Beckford*, Vol. xiv. 177.

4. Of moving to pay money into Court forthwith altered. In future a day must be named. *Higgins v. —*, Vol. viii. 381.

5. Defendant ordered to pay money into Court before answer, in a case of gross fraud, appearing upon affidavit by the plaintiff and by the defendant in answer. *Jervis v. White*, Vol. vi. 738.

6. A motion to compel a defendant to pay money into Court on casting up books must be upon the ground of admission by reference sufficient to make them part of the examination, as much as schedules to an answer. In this instance it failed: the plaintiff going upon certain books, and the reference being generally to all. *Mills v. Hanson*, Vol. viii. 91.

7. Motion to pay money into Court upon the affidavit of an accountant, that from the schedules to the answer, the examination and the books of account, such a balance was due, refused. S. C. Vol. viii. 68.

8. Money may be ordered into Court on motion, upon the ground of admission; as by schedules or books containing an account of receipts and payments, and referred to so as to be part of the answer or examination. *Ibid.* 69.

9. Where party neglecting to pay money into Court under an order is a solicitor, a stranger, and not party, the course is to obtain an order upon him to pay by a given day, and on default, to obtain another order that he shall pay by another day, or stand committed. *Anon.* Vol. iv. 207.

10. After an order upon a party in the cause to pay money, the

course is an attachment, and upon the return to that, an order for commitment. *Bowes v. Lord Strathmore*, Vol. xii. 325.

11. Order, after the bill dismissed, for payment of money out of Court. *Wright v. Mitchell*, Vol. xviii. 293.

And see ABATEMENT, 4.

[U.] CERTIFICATE OF COURT.

1. The Court of King's Bench refused to answer a case from the Rolls stated as a trust. *Parsons v. Parsons*, Vol. v. 578.

2. The Lord Chancellor being dissatisfied with the certificate of the Court of Common Pleas on a case sent, directed a case to that of King's Bench, there being only one instance of a case being sent back to the same Court to be reviewed. *Trent v. Hanning*, Vol. x. 500.

[V.] CONTEMPT.

And *vide supra* [A.] 11. [B.] 9.

The parties under commitment cannot be heard, except on petition. *Nicholson v. Squire*, Vol. xvi. 259.

And see COMMITMENT.—REGISTER OF COURT, 3.—SEQUESTRATION, 8.

PRE-EMPTION.

A right of pre-emption given by will, will be executed whether directed at a fixed price, or one to be fixed by the trustees; in the latter case it is to be taken at a reasonable price, to be ascertained by reference to the Master. *Earl of Radnor v. Shafto*, Vol. xi. 448.

And see WILL, [D.] 23.

PREROGATIVE.

In the case of a debt due to the Crown by a bankrupt, the Crown

will seize, if they can, before assignment. *Ex parte Smith*, Vol. v. 297.

PRESUMPTION.

And see BOND, 13, 14.—EVIDENCE, [B.]—SATISFACTION, *passim*.

1. Matters of record are presumed. Deeds are presumed to be lost. *Pickering v. Lord Stamford*, Vol. II. 583.

2. At law, length of time raises presumption against claims the most solemnly established. *Jones v. Tubberville*, Vol. II. 12.

Infancy of defendant no excuse for plaintiff's delay. *Ibid*.

3. A conveyance decreed, subject to an annuity charged on the estate; the annuitant having gone to Newry, in Ireland, sixteen years ago; and no payment made or account obtained of her since. *Mainwaring v. Baxter*, Vol. v. 458.

4. Upon possession for many years, the origin of it not appearing, and no title except as *cestui que trust* under a term to raise a sum of money, the Court will not presume any other title; and therefore decreed the plaintiff to be let into possession on payment of the charge; but with reluctance; and on account of the laches refused an account of the rents even from the filing of the bill. *Acherly v. Roe*, Vol. v. 565.

5. Payment ordered, where one party entitled had not been heard of for 20 years, upon a recognizance to refund in the event of a claim. *Bailey v. Hammond*, Vol. VII. 590.

6. As to presumption in favour of a title upon mere length of possession, unaided by other circumstances, *Quere*. *Harwood v. Oglander*, Vol. VIII. 129.

7. Purchase of stock in the joint

names of purchaser and a stranger, the latter a trustee for the personal representatives of the former, as he would have been for the purchaser himself; but the presumption may be rebutted by circumstances of enjoyment tending to show that it was a gift. *Rider v. Kidder*, Vol. x. 360.

8. Where the legal estate was vested in trustees, as an indemnity against contingent incumbrances, with a period stated when a moiety should be reconveyed, and it appeared that no incumbrance had been set up for 140 years, that there was no trace of the legal estate being outstanding in any one subsequent to the year 1694, and the plaintiffs were in possession of the deed creating the indemnity; held, that after every idea of an incumbrance had been at an end for more than a century, a reconveyance might be presumed from the trustee of the estate. *Hillary v. Waller*, Vol. XII. 239.

9. Ground of presumption as to incorporeal hereditaments, bonds, mortgages, &c. upon the want of means of belief. *Ibid*. 265.

10. In ejectment it may be left to a jury to presume a conveyance of the legal estate. *Ibid*. 251.

11. Grants are frequently presumed for the purpose and from a principle of quieting the possession, the Court governing itself by a moral certainty. *Ibid*. 252.

12. The relation of presumption of a party's death from absence, &c. goes from the first moment of the uncertainty of his existence. *Webster v. Birchmore*, Vol. XIII. 362.

13. No presumption of a grant of mines against an express reservation on a sale, many years ago; merely from permitting expenditure without claim. *Norway v. Rowe*, Vol. XIX. 156.

PRINTER, KING'S.

See COPYRIGHT, 7.

Upon bill by the King's printer for Ireland under letters patent, to declare his right, notwithstanding the resolution of the Houses of Parliament of 1796, and for an account, held there was no such equity as the Court could administer, and bill dismissed. *Grierson v. Eyre*, Vol. ix. 341.

PRINTS.

See COPYRIGHT, 1.

PRIORITY.

And see BANKRUPT, [K.] 7.—MORTGAGES SUBSEQUENT.

Agreement for a share of a ship then building, as a security for advances in order to complete her, with a covenant for a future bill of sale of such share, postponed to a subsequent bill of sale with possession taken, subject to the builder's lien, without notice of such agreement. *Daniell v. Russell*, Vol. xiv. 393.

PRIVILEGES.

Court not bound to take notice of particular privileges under charters confirmed by private statutes, notwithstanding a clause declaring them public acts. *Nabob of Carnatic v. East India Company*, Vol. i. 393.

PRIZE.

1. Prize causes determined in municipal courts, not by consent of nations; for it is just cause of war if their decisions are not agreed to. *Nabob of Carnatic v. East India Company*, Vol. i. 391.

2. Statutes of prize do not extend the Admiralty jurisdiction beyond its natural extent. *Ibid.*

3. The appellant from a decision of condemnation by the Admiralty Court is not bound to adhere to the security given; but may follow the property or proceeds in the hands of an agent. *Case of the ship Noy-somhed*, Vol. vii. 593.

4. The prize jurisdiction extends to the question, whether a person, who received and sold the property, received it as consignee for valuable consideration, or as prize agent. A prohibition therefore against a motion to bring the property or the proceeds was refused. *Ibid.*

5. No interest completely vested in prize before condemnation; but upon condemnation it is considered the property of the captor from the time of the capture. *Stevens v. Bagwell*, Vol. xv. 139.

6. The Crown, in prize grants, puts what is strictly bounty upon the footing of right; considering the claim as transmissible to the legal representatives of the claimant, deceased before the grant, subject to his will, &c. as his other property. *Ibid.* 139.

PROBATE.

1. Probate of will in the Ecclesiastical Court sufficient as far as it goes; farther proof, if necessary, may be proceeded on in this Court. *Colman v. Sorrel*, Vol. i. 54.

2. The Ecclesiastical Court acts without jurisdiction in granting probate of an instrument, which does not affect the personal estate. *Harbergham v. Vincent*, Vol. ii. 230.

3. Under a decree for payment of debts out of cash in the bank the Accountant General was ordered to pay the executor of a creditor by

simple contract under a probate in the diocese where he had resided, without a prerogative probate: the sum being small; and no *bona notabilia* out of that diocese. *Sweet v. Partridge*, Vol. v. 148.

4. Prerogative probate not dispensed with on account of the smallness of the sum. *Newman v. Hodgson*, Vol. vii. 409.

5. Probate is necessary in order to get money out of Court, however small. *Thomas v. Davies*, Vol. xii. 417.

PROCHEIN AMY.

And see INFANT, 18, 19.

1. After answer plaintiff not compelled to change the next friend on affidavit that she was worth nothing, and not found till after answer contradicted by her swearing to 44l. per ann. Defendant ought not to have answered, but have said he could not find her. *Anon.* Vol. i. 409.

2. Next friend cannot sue in *forma pauperis*, but ought not to be discharged for poverty: dangerous to displace him, though perhaps there may be a case gross enough for it. *Ibid.*

3. The Court refused a *prochein amy* the costs beyond the taxed costs. *Osborne v. Denne*, Vol. vii. 424.

4. The name of a co-plaintiff, as next friend, struck out on giving security for costs incurred in his time. *Wilts v. Campbell*, Vol. xii. 493.

PROHIBITION.

1. Whether a prohibition issued from the Court of Chancery, without application in Court, upon an affidavit stating merely that the cause of action arose out of the

PURCHASER.

jurisdiction, not adding, that foreign plea was tendered, and refused, is regular, *Quare*. But if it is irregular, any proceeding against it is a contempt. The party ought to apply to the Court to supersede it. The form of the affidavit to be altered in future. *Iveson v. Harris*, Vol. vii. 254.

2. The Court of Chancery always open; and therefore can issue a prohibition in the vacation. *Ibid.* 257.

3. A proceeding upon a bail-bond in the Marshalsea Court, assigned according to the practice of that Court to one of the officers, is not a proceeding against a prohibition restraining the original action, so as to incur a contempt. *Ibid.* 254.

PROTESTANT DISSENTERS.

See CHARITY, 71, 72.

PROXIMITY.

Construction of the description "*proximo de sanguine*." *Leigh v. Leigh*, Vol. xv. 109.

PURCHASER.

1. Purchaser must abide by the case of him from whom he buys. *Davis v. Austen*, Vol. i. 249.

2. Purchaser not permitted to apply part of his purchase-money in discharge of a mortgage on the estate, though some of the parties consented, others being infants, and it not appearing on the report that there was such incumbrance. *Quare*, If it could be done if all were competent and consented? — v. *Stretton*, Vol. i. 266.

3. Motion, that a person reported best purchaser should complete his

purchase by a certain day, refused; the report not being absolutely confirmed. *Anon.* Vol. II. 335.

4. Purchaser with notice is bound in all respects as the vendor; where therefore tenant for life granted leases for lives under a power, and bound himself upon the dropping of a life to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale: though the power is exceeded, yet if a life drops in the life of the lessor, the purchaser having notice must specifically perform by granting a new lease with the same provision. General notice to a purchaser that there are leases, is notice of all their contents. *Taylor v. Stibbert*, Vol. II. 437.

5. So purchaser, being told that part of the estate was in possession of a tenant, is bound by the lease. *Ibid.* 440.

6. This Court will not take the least step against a purchaser for valuable consideration, not even to perpetuate testimony against him. *Jerrard v. Saunders*, Vol. II. 458.

7. Defendant stating by answer a purchase for valuable consideration without notice shall not be compelled to answer farther. *Ibid.* 454.

8. Bill by tenant for life in possession for discovery and delivery of title deeds: plea, a mortgage in fee by a former tenant for life alleging himself to be seized in fee without notice, ordered to stand for an answer, with liberty to except. *Strode v. Blackburn*, Vol. III. 222.

9. Purchaser justified in taking a fair objection, though overruled. *Cox v. Chamberlain*, Vol. IV. 631.

10. Qu. Whether a purchaser under a power to revoke uses, substituting other estates of equal value, is not bound to show the value of the substituted estates. *Ibid.* 638.

11. Principle of the rule against purchases of the trust property by trustees, assignees, &c. *Ex parte James*, Vol. VIII. 345.

And see AGENT AND PRINCIPAL, [D.]—BANKRUPT, [I.] [W.]—EXECUTOR, [A.] 3.—EXONERATION, 2.—TRUSTEE, [D].

QUO WARRANTO.

1. Information in nature of *quo warranto*, upon 9 Anne, c. 20. for usurping the office of a free burgess, does not lie against the mere claim of one who, though elected, was never admitted; nor against a member until removed by the corporation. *R. v. Ponsonby*, Vol. I. 1.

2. Whether non-user of a public office is cause of forfeiture depends on circumstances. *Ibid.* 6. Though, *semble*, it is a misdemeanor punishable by a common information. *Ib.*

3. Non-residence not an immediate forfeiture. *Ibid.*

4. Where a corporation is guilty of an offence amounting to a forfeiture, the king has a discretionary power to seize the franchise into his hands. *Ibid.* 8.

RECEIVER.

And see PARTNER, 37.—WEST INDIA CONSIGNEE.

1. A manager of West India estates is not to give security to manage faithfully; ordered to account and to consign so far as the management requires it, but to have a discretion as to what to be applied there. *Morris v. Elme*, Vol. I. 139.

2. Receiver gives security duly to account, and not for faithful management; he cannot let, or make expenditures, without application to the Court; a manager may. *Ibid.*

3. *Quere*, If the Court will grant an order for receiver to distrain for rent. *Hughes v. Hughes*, Vol. I. 161.

4. Receiver is to let estate to the best advantage; but he cannot raise the rents on slight grounds, nor turn out tenants, nor even let for one year, without application to the Master. *Wynne v. Lord Newborough*, Vol. I. 165.

5. Appointment of receiver is in the discretion of the Master, who need not state his reasons. To support an exception there must be a substantial objection. *Thomas v. Dawkins*, Vol. I. 452.

6. Receiver has only to pay in his money yearly, and nothing out without an order from the Court. Deceit to pay interest for money kept longer in his hands; and an inquiry directed as to that, although he had passed his accounts, and all parties had declared themselves satisfied. *Fletcher v. Dodd*, Vol. I. 85.

7. The Masters shall annually, at the second seal after Trinity term, certify to the Court the state of the several receivers' accounts in their respective offices. *Gen. Ord.* Vol. II. 39.

8. The Master's judgment is conclusive in appointing a receiver, unless some substantial objection is shown. It is no objection that he is a practising barrister; but the solicitor in the cause cannot be receiver. *Garland v. Garland*, Vol. II. 137.

9. The trustee cannot be a receiver. *Anon.* Vol. III. 515.

10. The Court will not control the Master's appointment of a receiver without a special case. *Ibid.*

11. Upon a motion, that a receiver may be at liberty to defend an ejectment, the parties interested being adult and consenting, a reference was made, whether it was for their benefit. *Anon.* Vol. VI. 287.

12. A receiver is not to lay out money in repairs at his own discretion: but under circumstances an inquiry was directed; and the report stating, that the expenditure was for the lasting benefit of the estate, and by the direction of the trustees, the order for the allowance was made. *Blunt v. Clitherow*, Vol. VI. 799.

13. A trustee cannot be receiver; whether he is sole trustee or jointly with others. — *v. Jolland*, Vol. VIII. 72.

14. Receiver not passing his accounts shall always pay interest upon the balances in his hands. *Ibid.*

15. Receiver who does not pass his accounts regularly, not to be allowed poundage. *White v. Lady Lincoln*, Vol. VIII. 371.

16. Trustee cannot be a receiver; unless on a special case, and without emolument. *Sykes v. Hastings*, Vol. XI. 363.

17. Receiver remitting to his bankers on his own credit, and not on a separate account for the trust, charged with loss by the failure of the bankers. *Wren v. Kirton*, Vol. XI. 377.

18. Receiver not allowed for necessary repairs, until inquiry whether they were reasonable. *Attorney General v. Vigor*, Vol. XI. 563.

19. Receiver not liable by the failure of the testator's banker at Bristol, with whom the receiver, when going to London to pass his accounts, deposited the money, intending to draw for it. *Ibid.* 566.

20. The Court refused to appoint a receiver, upon the single ground, that the party, an executrix in mean circumstances, without any suggestion of unfitness or misconduct. *Anon.* Vol. XII. 4.

21. The Court refused to interfere with the Master's appointment of a

receiver, where no disqualification was shown. *Tharpe v. Tharpe*, Vol. XII. 317.

22. Court refused to appoint a receiver, merely upon the circumstance, that two wills are in controversy in the Spiritual Court, when that court can grant administration *pendente lite*. *Richards v. Chave*, Vol. XII. 462.

23. The circumstances admitted in the answer, showing strong ground of suspicion of abused confidence, and of probable title to recal a voluntary conveyance, Court entertained no doubt of its jurisdiction to appoint a receiver. *Huegonin v. Baseley*, Vol. XIII. 104.

24. Court will not take the administration from the executor on slight grounds. Court directed a receiver before answer, when it was suggested, by affidavit, that the property in his hands was in danger of being lost or misapplied, the co-executors consenting to the order. *Middleton v. Dodswell*, Vol. XIII. 266.

25. A receiver not paying a balance into Court, pursuant to an order, may be proceeded against personally, by commitment or by putting his recognisance in suit; but in the former case, there must be a previous order in the alternative. *Davies v. Calcraft*, Vol. XIV. 143.

26. Receiver not permitted to lay out more than a very small sum at his discretion. *Waters v. Taylor*, Vol. XV. 26.

27. Appointment of a receiver of an estate in India; the receiver to be in England, acting by an agent; inquiry directed what should be the term beyond which he should not be permitted to let. — *v. Lindsey*, Vol. XV. 91.

28. Receiver of the personal estate of the testator, not passing his accounts, and paying in the balances,

deprived of his salary, and charged with interest: not upon each sum from the time it was received, according to the strict rule, applicable to a receiver of annual rents and profits, but as an executor would be charged. *Potts v. Leighton*, Vol. XV. 273.

29. Distinction between an executor and a receiver as to allowances for charges and trouble. *Ibid.* 276.

30. General order, that receivers shall annually pass their accounts and pay in their balances, or lose their salaries, and be charged with interest at five per cent. *Ibid.* 278.

31. Petition to change a receiver. The Master's judgment not absolutely conclusive; but the Court interferes with reluctance.

The recommendation of the testator, and the respect due to a considerable family, are to be attended to in the appointment.

The circumstances of the person proposed (in this instance a relation of the family), a residence distant from the estate, being in parliament, and a practising barrister in town, though no absolute disqualification, are to be considerably regarded.

Distinction, with reference to such circumstances, between an auditor and a receiver, with powers to let and manage, &c. *Wynne v. Lord Newborough*, Vol. XV. 283.

32. General rule, that a trustee shall not be the receiver, with emolument. *Sutton v. Jones*, Vol. XV. 584.

33. A receiver may be appointed against the legal title in a strong case of fraud upon affidavits; but under the circumstances of this case, an application, after answer, for that purpose, an injunction against committing waste and disposing of the estate was refused. *Lloyd v. Passingham*, Vol. XVI. 59.

34. Receiver not ordered merely in dissolution of partnership. Or-

dered on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account. *Harding v. Glover*, Vol. xviii. 281.

35. Receiver, on affidavits, before answer. *Duckworth v. Trafford*, Vol. xviii. 283.

36. Receiver, in default of payment into Court, on an equitable charge and a judgment, but execution prevented by the circumstances of the title. The right not affected by a subsequent variation of circumstances; and established over the whole estate, though of great value, compared with the debt; as a reasonable part may be tendered as security, or the debt may be paid into Court. *Curling v. Mrs. Townsend*, Vol. xix. 628.

37. Motion for a receiver on a mining concern refused upon a claim of partnership in the equitable interest, not raised, until the concern was, at a great expense, become prosperous, and denied by the answer. *Norway v. Rowe*, Vol. xix. 144.

RECOMMENDATION.

See TRUST ESTATE, 3, *et seq.*

RECOVERY.

1. Estates comprised in a recovery: the words being sufficiently comprehensive, notwithstanding an inference against the possession of the party, and his intention to include them from acts done under a misconception of his title. *Pigott v. Waller*, Vol. vii. 98.

2. Under the statute 40 Geo. 3. c. 56. to prevent the necessity of suffering recoveries by tenants in tail, of land to be purchased, all parties must petition. *Baynes v. Baynes*, Vol. ix. 462.

REGISTER OF COURT.

1. *Quere*, If the office of register of the Court of Chancery be assignable? *Colman v. Duke of St. Albans*, Vol. iii. 33.

2. The grant of the office of register of the Court of Chancery for lives in trust for the Duke of St. Albans, his heirs and assigns, descends to the heirs general; and does not follow the title; and being assignable, the claim of the mortgagee was established, but not to the by-gone profits. (See Vol. iii. 25.) The duke being trustee, but having obtained possession without title, as heir, the Court, though the plaintiff was an infant, inclined not to carry the account farther back than the time of filing the bill, if the profits had not been paid into Court at an earlier date in the suit instituted by the mortgagee. *Drummond v. the Duke of St. Albans*, Vol. v. 433.

3. The Court will commit a party guilty of an act of violence in the register's office as a contempt. *Ex parte Burrows*, Vol. viii. 535.

REGISTRY ACTS.

And see MORTGAGE [A.] 14.—SHIP.—SHIP REGISTRY.—VENDOR AND PURCHASER, [A.] 49.

1. A registered conveyance of premises in Middlesex for valuable consideration established against a prior devise not registered; the evidence of notice, which ought to amount to actual fraud, not being sufficient. *Jolland v. Stainbridge*, Vol. iii. 478.

2. The object of the registry acts is only to protect subsequent purchasers: the want of registering does not vitiate the conveyance, as between the parties, under a commis-

sion of bankruptcy. *Jones v. Gibbons*, Vol. ix. 407.

3. Clerical mistakes do not vitiate enrolment under the registry act. *Wyatt v. Barwell*, Vol. xix. 435.

4. To affect a registered deed by notice of a prior unregistered deed, the policy of which has been much doubted, actual notice must be clearly proved, amounting to fraud. *Ibid.*

5. Notwithstanding the rigorous exactness that has been required in enrolments under the annuity act, clerical mistakes do not vitiate the memorial. *Ibid.* 438.

RE-HEARING.

1. Two days' notice is sufficient for a re-hearing. *Robinson v. Taylor*, Vol. i. 45.

2. Generally there can be only one re-hearing. *Waldo v. Caley*, Vol. xvi. 214.

3. Decree on default setting aside a lease of a charity estate, with covenant for perpetual renewal, and directing an account of the actual rent. Re-hearing permitted, on paying costs, not disturbing proceedings before the Master, to the draft of a report of what was due: but the money not to be paid into Court before the report made. Petition, not motion, the proper application. *Attorney-General v. Brooke*, Vol. xviii. 319.

4. Re-hearing of course on the certificate of counsel. *Ibid.* 325.

5. After the order permitting the defendant to re-hear the decree made on his default, setting aside the charity lease, and directing an account of the rents, he was ordered to give security for the sum reported due. S. C. *Ibid.* 496.

And see PRACTICE, [K.]

RELATIONS.

1. Bequest to relations does not include those by marriage. *Maitland v. Adair*, Vol. iii. 231.

2. Various constructions of "relations" in devise. *Wright v. Atkins*, Vol. xix. 301.

3. The word "relations," or "near relations," from their extent, confined to the next of kin, under the statute of distributions. *Smith v. Campbell*, Vol. xix. 403.

4. Devise to relations to claim within a year, established for those claiming within that period. *Walter v. Maunde*, Vol. xix. 426.

And see POWER, 62.

RELEASE.

1. Release after a general assignment no answer to the assignee, if notice. Defendant's knowledge that assignee was, on many occasions, a trustee for assignor, may be sufficient to affect him with notice. *Wilkinson v. Stafford*, Vol. i. 43.

2. Release of a debt: a reversion not included by the general terms. *Lord Braybrooke v. Inskip*, Vol. viii. 417.

3. A waiver is nothing, unless it amount to a release. *Stackhouse v. Barnston*, Vol. x. 466.

And see TENANCY IN TAIL, 16.

REMAINDERS — CONTINGENT—CROSS.

And see COPYHOLD, 2.—DEEDS [B.]

5.—DEVISE, 75.

1. In case of a trust, the estate in the trustees will support contingent remainders. *Habergham v. Vincent*, Vol. ii. 234.

2. Cross remainders implied. *Burnaby v. Griffin*, Vol. iii. 266.

3. Execution of a direction by will to convey lands to be purchased, by raising cross remainders among

more than two, upon the intention, by implication, without regard to the words "several and respective," in the limitation to the heirs.

Distinction upon this subject between devises by a general description, to a class of persons, not ascertaining the number, and to individuals named. *Green v. Stephens*, Vol. xvii. 64.

4. The reasoning in the implication of cross remainders, upon the expression, "all the premises," &c. not satisfactory. *Ibid.* 75.

5. Under a devise in trust to settle on the devisor's children, in equal shares and proportions, undivided, for and during their respective lives, with remainder to their issue, severally and respectively in tail general, with cross remainders over, there being two daughters, cross remainders inserted, not only among the several children of each, but also as between the two families. *Horne v. Barton*, Vol. xix. 398.

6. Implication of cross remainders, under a direction, in default of such issue, to go over. *Ibid.* 400.

RELIEF.

1. Relief prayed by the bill, but given up at the hearing, must be expressly waived on the record. *Dundass v. Dutens*, Vol. i. 197.

2. A party might be compelled to produce papers connected with the relief. *Wright v. Mayer*, Vol. vi. 281.

3. Party praying a relief different from that which he is entitled to. *Quare*, If he can have the latter under the general prayer for relief? The proper relief may, however, be obtained by amendment. When another party was necessary to be added, leave was given to amend by adding that party, including the introduction of facts consequent upon such addition, and praying such re-

lief as he should be advised. *Palk v. Clinton*, Vol. xii. 48.

4. Relief, according to the case made by the bill, granted under the general prayer, though not specifically asked upon 36 Geo. 3. c. 90. *Hiern v. Mill*, Vol. xiii. 120.

REMAINDERMAN.

And see RENEWAL, 4.

1. Motion by a remote remainder and tenants to restrain receiver from ejecting tenants, refused with costs, their interest not being sufficient. *Wynne v. Lord Newborough*, Vol. i. 164.

2. Tenant for ninety-nine years, if she shall so long live; remainder to trustees to preserve contingent remainders; remainder to the heirs of her body; remainder over to the same trustees upon trust for other persons. Upon the application of those persons and the trustees, under the statute 6 Ann. c. 18. the husband of the tenant for life was ordered to produce her. *Ex parte Grant*, Vol. vi. 512.

And see TENANCY IN TAIL.

RENEWAL.

And see LEASE, 11. 20.—SPECIFIC PERFORMANCE, [B.] 13.—TENANCY FOR LIFE.—WILL, [B.] 48.

1. Lessor for lives, under covenant to renew, on expiration of one, not bound, if no application until two drop. *Bayly v. Corporation of Leominster*, Vol. i. 476.

2. Right of renewal forfeited by the laches of the tenant. *Baynham v. Guy's Hospital*, Vol. iii. 295.

3. The Court leans against a construction for perpetual renewal, unless clearly intended. *Ibid.*

4. Bill by devisee, in remainder to him and his heirs male, of a lease

for life, against tenant for life, also entitled in reversion to him and his heirs, to compel him to procure a renewal, one life having dropped, the lease being, by the will, to be kept full, and no more than 500*l.* charged thereon for that purpose, upon the dropping of each life: devised that lease should be renewed, if plaintiff chose to pay the excess, in trust to secure the 500*l.* and subject thereto, for the defendant for life; after his decease, to raise the farther sum advanced by plaintiff for renewal and expense of suit, with compound interest at four per cent. during life of defendant, and subject thereto for plaintiff, in tail male, remainder to defendant in fee. The defendant was not allowed to charge the estate with 500*l.* towards a fine paid by him upon a former renewal without consent of the remainder man. *White v. White*, Vol. IV. 24.

5. Tenant for life of an estate for lives, being himself one of the lives, it is not competent to the remainder man to compel him to contribute to the expense of renewal, if it be a legal estate. *Quære*, If it were a trust? *Ibid.* 33.

The rule, that tenant for life of an estate for *lives* shall pay one-third, held unreasonable, and not now to prevail: the fair proportion is, that he shall keep down the interest, like the devisee of a mortgaged estate. *Ibid.*

6. And afterwards upon an inquiry, directed on a re-hearing, the plaintiff appearing to have consented to the former renewal in 1786, the defendant was held entitled to charge 500*l.* towards the fine upon that as well as all other renewals: and the decree was varied accordingly. S. C. Vol. v. 554.

7. Construction of a covenant for renewal under the like covenants,

&c., that it was not for perpetual renewal; the Courts leaning against that construction, unless clearly intended. *Moore v. Foley*, Vol. VI. 232.

8. A leasehold estate renewable, being bequeathed with limitations in the nature of a strict settlement, the habit being to renew annually and to underlet, the decree declared that the fines, upon renewal, ought to be paid out of the rents and profits; and that the person entitled for life undertaking to pay those fines out of the rents and profits, was entitled to the fines on renewal of the under-leases; and a renewal of such of the under-tenants as should be desirous of it, was directed. *Milles v. Milles*, Vol. VI. 761.

9. Grant of an annuity for life out of tithes leased for years, with covenant for further assurance. The lessee afterwards renewed the lease, married, and died. Her husband administered, and renewed with his own money. The annuity is a charge upon the renewed term generally; and the grantee is not bound to contribute to the expense of renewal. *Moody v. Matthews*, Vol. VII. 174.

10. Settlement of a renewable lease in trust, out of the rents and profits, to pay the fines and charges of renewing, and subject thereto, for husband and wife successively for life; remainder to the first son at twenty-one. The trustees not having renewed in the lives of the tenants for life, answerable, as for a breach of trust, though not deriving any benefit from it; liable, therefore, with the assets of the tenants for life, with reference to their enjoyment, and the occupying tenant having purchased the husband's life interest to procure a renewal for the son: the trustees indemnified against the expense, by an application of

the assets of the tenants for life in the first instance; but the occupying tenant not charged in their favour. *Lord Montford v. Lord Cadogan*, Vol. xvii. 485.

11. Upon bequest of leaseholds to testator's widow, with remainders over, and it appeared that the leases contained covenants for renewal, and the term expired during testator's life, but he continued to hold as tenant by the year, held that his widow having renewed, took such subsequent lease subject to the uses of the will. *James v. Dean*, Vol. xi. 383.

12. The general doctrine, "that a renewed lease does not pass by a general bequest of all leasehold estates," depends upon the context of the will. *Ibid.* 390.

13. (*Ante*, Vol. xvii. 485.) The decree affirmed, with the explanation, that the tenants for life are to be charged respectively, not upon their actual enjoyment, but as it would have been under a due execution of the trust, by renewing, with a fund drawn from the rents and profits. Liberty to the plaintiff, the son, as against the assignee of his father's life estate, to apply, if not otherwise paid, not as, but if, he shall be so advised, so as not to imply an opinion, that the assignee will be liable. *Lord Montford v. Lord Cadogan*, Vol. xix. 633.

RENTS AND PROFITS.

See ACCOUNT, 10, 11.—TENANT IN TAIL, 17.—TRUSTEE, 1.

REPRESENTATIVE.

1. A representative must take his interest as fortune has directed it, and has no equity to vary it: therefore, where a lunatic dies entitled

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to an estate, and also to a charge upon it, the heir takes it discharged. A trust term to secure the charge makes no difference, for it remains inert, unless required to be executed for proper purposes: the trustees have no discretion. *Lord Compton v. Oxenden*, Vol. ii. 261.

2. Testatrix directed her real estate to be sold, and all her estate to be converted into money for the purposes of her will: the will was satisfied without touching the real: no equity for the next of kin against the heir. *Chitty v. Parker*, Vol. ii. 271.

3. Testator gave real estates to be sold, and the produce to be considered as part of his personal estate; and thereout and out of his personal estate gave legacies to his next of kin, heir, and others: he gave other estates to be sold, and the produce to be considered from thenceforth as other part of his said personal estate and to be disposed of in manner following: he then gave legacies, and some estates specifically, and other legacies out of his said trust monies and personal estate; and gave his executor 1000*l.* to be disposed of according to any instructions he might leave in writing, and gave all the residue of his goods and chattels, personal estate and effects, whatsoever, subject to debts, legacies, &c. No instructions being found, the heir is entitled to the 1000*l.* *Collins v. Wakeman*, Vol. ii. 683.

4. Money settled in trust to be paid according to the appointment of A., and in default thereof to his legal representatives, according to the course of administration: A. by will, in pursuance of the power, appoints to such legal representatives, and makes a residuary legatee, whom he also appoints his executors. Upon the will the next of kin are

entitled. *Jennings v. Gallimore*, Vol. III. 147.

5. Testator gave his wife real and personal estate in bar, &c. of all dower or thirds: he gave the residue to four persons, and afterwards, by codicil, directed them to dispose thereof in charities: part of the residue being invested in real securities, goes, according to the statute, as undisposed of; and the widow is not barred. *Pickering v. Lord Stamford*, Vol. III. 332. 492.

6. Testator gave real and personal estate to one daughter in satisfaction of her child's part of whatsoever more she might have expected from him, or out of his personal estate: he also gave a provision to his wife in full of her dower, thirds, or other claim at law or in equity, or by any local custom, to any other part of his real or personal estate: the residue to his other daughter: upon her death in his life, he by codicil gave it according to the appointment of his wife: the power not being duly executed, the residue goes, according to the statute, as undisposed of; and the widow and daughter are not barred. *Ibid.* 335.

7. Neither an heir at law nor next of kin can be barred by any thing but a disposition. *Ibid.* 493.

8. No equity between the heir or devisee and personal representative to convert property from the state in which it is found at the death. *Attorney-General v. Bowyer*, Vol. v. 303.

9. To convert real or personal property, as between real or personal representatives, from the state in which it is found at the death, the character of land or money must, by the trust, covenant, &c. be imperatively and definitively affixed to it: otherwise, if there was an option, there is no equity. The bill by the heir, claiming the personal

property as real estate, was dismissed without costs. *Wheldale v. Partidge*, Vol. v. 388.

10. As between the heir and the personal representative, whatever is the liability of the party himself to take at his death, must be the state of liability upon questions between those representing him; if he could not be compelled to take, the heir could not insist on having it, and making the personal estate pay for it. *Broome v. Monck*, Vol. x. 607.

11. Distinction between a limitation to the executors and administrators, and to the next of kin; as between a limitation to the right heirs and to heirs of a particular description as to real estate, giving the ancestor, having a particular estate, the whole property in the former case, not in the latter. *Anderson v. Dawson*, Vol. xv. 536.

12. Lessee for years, with an option, at certain periods, to purchase; making that option, was considered owner *ab initio* for the benefit of the heir; the price to be paid by the executor. *Daniels v. Davison*, Vol. xvi. 253.

13. One lease for lives to the lessee and her heirs, and another to her and her executors: as to the effect in equity of a declaration of trust for A. simply, *Quære*. But if the leases were merely renewals by a guardian, the trust must follow the actual interest of the infant, viz. in one estate to the heir, in the other to the executor. *Milner v. Lord Harewood*, Vol. xviii. 274.

14. The real estate, except what was converted in execution of the power, taken by the next of kin as real, the will not operating a conversion out and out; the representatives therefore, the trust being disappointed, taking the respective estates as they find them, having no equity against each other. The

costs apportioned according to the value of the real and personal estates. *Walter v. Maunde*, Vol. XIX. 424. (See *Cole v. Wade*, Vol. XVI. 27.)

15. Right of the next of kin to the residue undisposed of, not under testator's intention, but by the absence of intention, that they are not to take. *Mills v. Farmer*, Vol. XIX. 485.

And see TRUST ESTATE, 8. 12.14.

REPUBLICATION.

See WILL, [A.] 14, *et seq.*

RESIDUE.

And see EXECUTOR, [B.]—LEGACY, [L.]

1. General devise and bequest to two persons, their heirs, executors, administrators, &c. upon trust in the first place to pay, and charged and chargeable with all the testator's debts and funeral expenses, and the legacies after given. Those persons, being afterwards appointed executors, taking the absolute property, subject only to a charge, are entitled to the residue undisposed of (including a legacy to a charity, void by statute 9 Geo. 2. c. 36.), for their own benefit against the claim of the next of kin; the whole property being personal. Upon their right, as executors, *Quære. Dawson v. Clarke*, Vol. XVIII. 247.

2. Executor takes all, not meant to be disposed of; not all that is not disposed of, as in the case of lapse; or being appointed executor in trust, and no object expressed. *Ibid.* 254.

3. Personal property bequeathed upon trust, which does not exhaust the whole, the executor not entitled to the surplus. *Ibid.* 255.

4. Devise and bequest upon trust: the devisee cannot take beneficially

RESULTING TRUST.

the real estate not exhausted: but a trust results for the heir; nor can the executor, whether himself the trustee or another, take beneficially the surplus of the personal property. *Ibid.*

5. In the ordinary case of lapse the executor will not take; though the subject is not given to any one else. *Ibid.*

6. The general residue of personal property comprehends every thing not otherwise effectually disposed of; and no difference whether a legacy falls into it by lapse, or as void at law; the next of kin therefore excluded, by an express bequest of the residue. *S. C. ante*, Vol. xv. 416.

7. Distinction between the bequest of a residue and of enumerated parts with the words "personal estate," not described as residue. *Bootle v. Blundell*, Vol. XIX. 523.

8. Residuary bequest of the personal estate not hereinbefore specifically disposed of, not specific without a clear indication of that intention. *Ibid.* 532.

RESULTING TRUST.

And see ADVANCEMENT, 2.—DEVISE, 80. 83.—HEIR.

1. Devise of real and personal in trust, personal alone being sufficient, and the residue undisposed of, there is a resulting trust as to the real for the heir at law. *Robinson v. Taylor*, Vol. I. 44.

2. Consideration of deed only 5s. resulting trust arises to the grantor. *Sculthorp v. Burgess*, Vol. I. 92.

3. Devise upon a future contingency, and no intermediate disposition of the rents and profits, a resulting trust for the heir. *Attorney-General v. Bowyer*, Vol. III. 725.

4. The produce of real estate sold

under a power in a will passed by a residuary clause with the personal estate: the object being a conversion out and out: but part remaining unsold was held a resulting trust for the heir at law. *Brown v. Bigg*, Vol. vii. 279.

5. Where by the will it was clearly ascertained for whose benefit the sale of real estate was directed, which purpose failed; declared a resulting trust as to the real estate for the heir, and as to the personal for next of kin. *Williams v. Coade*, Vol. x. 501.

6. General devise and bequest upon trusts, not sufficient to exhaust the whole property; a resulting trust for the heir and next of kin. *Dawson v. Clark*, Vol. xv. 416.

7. Resulting trust for the heir; the only express devise being to convey to the devisor's son, from and after his age of thirty, which he did not attain; and no devise by implication from a declaration, that he shall have no power over the estate until his age of thirty. *Nash v. Smith*, Vol. xvii. 29.

8. Trustee for the purchase of land died without personal assets; having purchased land. If the trust could have been executed during his life, which upon the construction was questionable, yet no part of the trust fund being traced, and the circumstances affording no presumption that the purchases were made in execution of the trust, they were held not liable. *Perry v. Phelps*, Vol. xvii. 173.

9. Devise when the devisee attains twenty-one, a resulting trust for the heir until that period; and by the previous death of the devisee the remainder accelerated. *Chambers v. Brailsford*, Vol. xviii. 368.

10. Bequest of accumulated fund from real and personal estate, when the legatee attains twenty-one, upon his death under that age a resulting

trust for the respective representatives. *Ibid.*

RETAINER.

A right of retainer is not prejudiced by the circumstance that the administration is granted to another for the use of the creditor, a lunatic, any more than if *durante minoritate*; nor that the debt is due to a trustee. *Franks v. Cooper*, Vol. iv. 763.

REVERSION.

1. The sale of a reversionary interest in this Court considered as the case of an expectant heir, forms an exception to the general rule, that for mere inadequacy of value, a contract is not to be set aside. During the continuance of the same situation, acquiescence has no effect; and the value is to be estimated at the time of the transaction, not according to the event.

Interest at 5 per cent. upon the money advanced, compound interest refused. *Gowland v. De Faria*, Vol. xvii. 20.

2. Jurisdiction as to the valuation of reversionary uncertain interests, depending on lives. *Montesquieu v. Sandys*, Vol. xviii. 311.

REVIEW, BILL OF.

1. Commission of review in Ireland upon a sentence of the Court of Delegates, affirming a sentence of the Prerogative Court. *Goodwin v. Gieslér*, Vol. iv. 211.

2. Commission of review granted upon a sentence of the Court of Delegates affirming a sentence of the Prerogative Court establishing a will. *Matthews v. Warner*, Vol. iv. 186.

3. Costs of course upon a bill of review for error; where no error in

the decree. *Bolger v. Mackell*, Vol. v. 509.

4. The prerogative of granting a commission of review is to be exercised upon the peculiar circumstances and the importance of the case. In this instance, a sentence of the Court of Delegates setting aside a will, the report of the Lord Chancellor was against the application: his lordship concurring upon the evidence, that the will was obtained, or an alteration prevented, by undue influence; and there being no question of law. Upon this proceeding no costs are given. *Ex parte Fearon*, Vol. v. 633.

5. Application for a commission of review to re-hear a sentence of the Prerogative Court, upon a will affirmed by the Delegates, referred to the Lord Chancellor; who certified against granting the commission; on the ground, that the case did not furnish any such doubt with reference to the facts, or to important points of law, as made it expedient to grant the commission; which is prayed of the grace and benignity of the crown, regulated by sound discretion; usually withholding it upon grounds of public expediency, unless there are very cogent reasons for believing, that the sentence is founded on error in fact or in law; or, unless the doctrines of law, upon which it is supposed to be founded, are so questionable and important as to make it clearly fit, that they should be considered in the most solemn manner. *Eagleton and Coventry v. Kingston*, Vol. VIII. 438.

6. Grounds of granting a commission of review. *Ibid.* 465.

7. Whether a commission of review can be granted with a clause, admitting a new plea and new proofs, *Quere.* At least the memorial ought to contain allegations, and a special prayer. *Ibid.* 466.

8. A different conclusion of fact

upon the evidence not a sufficient ground for the extraordinary relief of a commission of review. *Ibid.* 471.

9. Bill of review may be also a bill of revivor and supplement. *Perry v. Phelps*, Vol. XVII. 173.

10. Error apparent, to support a bill of review, must be plain and obvious; as a decree against an infant without a day to show cause; not merely an erroneous judgment, which might be the subject of a re-hearing. *Ibid.*

11. Whether a bill can be maintained as a bill of review in case the decree should have been enrolled, or, if not, as a bill of revivor and supplement, with a prayer in the alternative adapted to either case; whether there is any instance of a bill in the nature of a bill of review, upon error apparent or matter of law, to be collected from the pleadings and evidence, a supplemental bill being required only to introduce new facts, to come on with a re-hearing of the original cause, *Quere.* *Ibid.*

12. For a bill of review on newly discovered facts, the leave of the Court necessary. *Ibid.* 177.

13. Distinction between a bill of review, and a supplemental bill in nature of it; if the decree is enrolled it is strictly a bill of review, and prays that the decree may be reviewed and reversed: if not enrolled, the prayer is, that the cause may be re-heard; in either matter of supplement or revivor may be introduced with the proper prayer. *Ibid.*

14. Petition for leave to file a bill of review after a decree, affirmed on re-hearing, and pending an appeal to the House of Lords, for the purpose of introducing evidence in answer to evidence, admitted by surprise, viz. not in answer to an interrogatory, nor the subject directly in issue, the decree not being made

upon that evidence was refused with costs. *Willan v. Willan*, Vol. xvi. 72.

15. Bill of review, or a supplemental bill in nature of it, where the decree has not been enrolled, upon new evidence discovered since publication, not permitted to introduce a new case; of which the party was sufficiently apprised to enable him with reasonable diligence to have put it upon the record originally. *Young v. Keighly*, Vol. xvi. 348.

16. Grounds of bill of review; error apparent; new evidence discovered since publication, as to a material fact. *Ibid.*

And see WILL, [A] 2.

REVIVOR.

1. After a decree the suit may be revived by a defendant, or by the representative of a deceased defendant. *Williams v. Cook*, Vol. x. 406.

2. Where one tenant in common dies, the other may revive, without making him a co-plaintiff, but if he does so, he must make him a co-defendant. *Fallowes v. Williamson*, Vol. xi. 306.

3. Upon revivor by *scire facias* all must join. *Ibid.* 311.

Quere. If the defendant in the original cause be in contempt, having had the usual orders for time to answer, upon a revived bill by the representatives, has a right again to the usual course of orders. *Ibid.*

4. The cases in which a defendant may revive are confined to matter of account, and where he has an interest in the farther prosecution of the suit. The Court therefore allowed the demurrer, where the only object of the party, a defendant in the original cause, was to put an end to the suit, and dissolve the injunction, that he might go on at law. *Horwood v. Schmedes*, Vol. xii. 311.

5. Upon the marriage of a female plaintiff, her interests being secured by settlement in trustees, revivor

alone is not sufficient, but the trustees must be brought forward by a supplemental bill. *Merryweather v. Mellish*, Vol. xiii. 163.

6. Where the husband had covenanted to permit the suit to be revived by the trustees, the Court would not permit him to consent to a stay of attachment against the defendant in contempt. *Ibid.*

And see COSTS, 12, 13, 16, 19. PRACTICE, [N.] 12.

REVOCATION.

See POWER, 70.—WILL, [C.] *passim*.

SALES.

1. The Court refused to make an order under an act of parliament for the sale of estates upon the opinion of a conveyancer, approving a conveyance, without a reference to the Master. *Ex parte the Duchess of Newcastle*, Vol. vi. 454.

2. The Court, on the ground of convenience, often sells property which subsequently perhaps it would have been unnecessary to sell, as real estates, before it can know the real situation of the personal estate, looking at its own powers of setting right the interests of all parties as among each other. *Lloyd v. Johnes*, Vol. ix. 65.

SATISFACTION.

And see COVENANT, 1.—ELECTION, 23.—LEGACY, [1].—MARRIAGE SETTLEMENT, 2.

1. Slight circumstances are laid hold of to get rid of the rule, that a legacy to a creditor extinguishes the debt: but a little difference between a portion and a legacy to a child as to the time of payment shall not prevail against the presumption of satisfaction. *Barclay v. Wainwright*, Vol. iii. 466.

2. Portions for children by the will of the parent presumed a satisfaction of a prior provision by set-

tlement, unless clearly not so intended: the presumption is not rebutted by slight circumstances: accounts in the testator's handwriting were admitted as evidence of the circumstances, under which he made his will; but not to explain the will. *Hinchcliffe v. Hinchcliffe*, Vol. III. 516.

3. The Court will lay hold of any circumstances to get out of the rule, that a debt is satisfied by an equal legacy. *Ibid.* 529.

4. Portions for children by the will of the parent held a satisfaction of a provision by settlement upon the intention: slight circumstances of difference, that would repel the presumption of satisfaction between strangers, are not sufficient in the case of parent and child. *Sparkes v. Cator*, Vol. III. 530.

5. A negotiable bill of exchange not satisfied by a legacy. *Carr v. Eastabrooke*, Vol. III. 561.

6. Nothing presumed in favour of the rule, that a debt is satisfied by a legacy equal or greater. *Ibid.* 564.

7. Settlement previous to marriage of the wife's fortune on herself, with a covenant by the husband in consideration of the marriage, &c. and for making some provision for the wife and her issue, to pay within three months after his death 6000*l.* to the trustees, in trust if the wife should survive him, and there should be no issue, (which was the event,) to pay 1500*l.* to the wife, her executors, &c. and to pay the interest of the remaining 4500*l.* to her for life. She is entitled to dower: and her share under the statute of distributions is not a satisfaction or performance of the covenant. *Couch v. Stratton*, Vol. IV. 391.

8. Legacy at twenty-one, the interest for maintenance, not satisfied by advancements during minority for the infant's benefit, nor by a legacy larger, but of a different nature, received under the will of the executor:

there being no positive relinquishment; though no demand for ten years. *Lee v. Brown*, Vol. IV. 362.

9. As to a presumed satisfaction of a debt by a legacy, there is no distinction between the cases of parent and child and of strangers: therefore circumstances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of satisfaction. *Tolson v. Collins*, Vol. IV. 483.

10. Portion by will *primâ facie* a satisfaction of a portion by settlement. *Ibid.* 491.

11. Distinction between a legacy and a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter; and parol evidence of an intention to satisfy cannot be admitted originally, as it may where first introduced to repel a presumption. *Freemantle v. Bankes*, Vol. V. 79.

12. Upon a question of presumption of satisfaction in a hard case the Court gave the executors leave to bring an action upon the bond; but would not direct it. *Reeves v. Brymer*, Vol. VI. 516.

13. A son placed by his father in business, accounting to his father for all the profits, deducting only the expense of his board, having made no demand for wages during his father's life, was held not entitled as a creditor after his father's death; or, if he had a demand, it was satisfied by a will, giving him a legacy to a greater amount, and other benefits. *Plume v. Plume*, Vol. VII. 258.

14. Presumed satisfaction of a legacy by a portion: the evidence not being sufficient to rebut the presumption. *Trimmer v. Bayne*, Vol. VII. 508.

15. Distinction as to satisfaction between the case of double portions and performance of a covenant. In the former small circumstances of difference are overlooked. *Ibid.* 515.

16. Though generally, a satisfac-

tion by will of a portion must be of the same nature, and equally certain, a bequest of a share in powder works to be made up in value 10,000*l.*, charged with an annuity of 20*l.* for a life, was held a satisfaction of a portion of 2000*l.* *Ben-gough v. Walker*, Vol. xv. 507.

Land not a satisfaction for money, nor *vice versa*, not being *ejusdem generis*. *Ibid.*

As to satisfaction of a portion by a residue. *Ibid.* 513.

Whether a portion of 2000*l.* would not be satisfied by a bequest of so much of his residuary estate as should be of the value of 2000*l.*, *Quere. Ibid.* 514.

17. Satisfaction of a legacy by a parent to a child by a portion of the same amount, though with some circumstances of difference. Whether parol evidence can be admitted originally of an intention to substitute the one provision for the other, or only where it is first offered against the presumption, it is clearly admissible to show that the father was the author of the portion, viz. by stipulating on joining in the marriage settlement of his eldest son for a charge, and giving up interests in consideration of it. *Hartopp v. Hartopp*, Vol. xvii. 184.

18. In the case of double provisions by a father for a child, slight circumstances of difference not regarded. *Ibid.* 191.

19. Implied satisfaction of a debt from a father to his child by a marriage portion of a greater amount. *Chave v. Farrant*, Vol. xviii. 8.

20. The presumption of intention to satisfy a legacy by a portion to a child from a parent or a person placing himself *in loco parentis*, not raised upon a legacy, not described as a portion, the legatee, reported to be the testator's natural daughter, described, not so, but as the daugh-

ter of another man. *Ex parte Pye and Dubost*, Vol. xviii. 140.

21. The law does not acknowledge the relation of a natural child; who is therefore considered as a stranger, within the rule of satisfaction of a legacy *prima facie* by an advance of money. *Ibid.* 147.

22. Portion by settlement, vested at twenty-one, or marriage of daughters, to be paid at the death of the surviving parent; if the parents, or either, should, in their or either of their lifetime settle, give, or advance money, lands, &c. in marriage or otherwise, such advancement to be taken as part or the whole of the portion, unless the contrary declared in writing. A legacy payable at twenty-one a satisfaction *pro tanto*. *Onslow v. Mitchell*, Vol. xviii. 490.

23. Rule as to satisfaction of a portion by a legacy, that there must be some express evidence, or at least a strong presumption, that it was intended, as such. Slight variation in the time of payment between twenty-one and twenty-one or marriage immaterial. *Ibid.* 493.

24. Presumption of satisfaction of a legacy by a portion from a parent or person *in loco parentis*, not applied to an illegitimate child: no relationship existing in law: nor recognised expressly or by inference by the testator, neither a legal parent, nor assuming the parental character, or discharging parental duties; and nothing in the nature or manner of the legacy, indicating, that it was given as a portion by a father for his child. *Wetherby v. Dixon*, Vol. xix. 407.

25. No general rule, that a second gift must be understood as substitution, not addition: but a reasonable presumption, that a debtor does not pay twice. *Ibid.*

26. Origin of the presumption against double portions from giving the name of a debt to a portion from a father to child, not perhaps with great propriety in a country where there is no claim to any thing in the nature of *legitime*. To come within that rule the donor must be parent, or *in loco parentis*; and the first gift must be in nature of a portion. *Ibid.*

27. Distinction between legitimate and illegitimate child, as to the presumption against double portions, favourable to the latter. *Ibid.* 412.

28. Subsequent provision for a legatee not of itself an ademption. *Ib.* And see POWER, 74.

SCANDAL.

And see PRACTICE, [E.] 5. 56.

1. Answer referred for scandal on the motion of another defendant. *Coffin v. Cooper*, Vol. vi. 514.

2. Reference for scandal upon the application of any one, not a party, nor even without a motion. *Ibid.*

3. What is material or relevant not to be considered scandal. *Ibid.*

4. Principle of referring scandal to the Master in the first instance. *Ibid.* 515.

5. Difference between plaintiff and defendant referring for impertinence, not applicable to scandal. *Ibid.*

6. Affidavit in bankruptcy ordered to be taken off the file as irrelevant and scandalous, with costs, as between attorney and client. *Ex parte Simpson*, Vol. xv. 476.

7. Allegations, material to the issue, are not impertinent; and being relevant and pertinent, though they may be false, and of whatever nature, are not scandalous. *Ib.* 477.

8. Scandalous matter, as allega-

tions, reflecting upon moral character, and not relevant to the subject, to be expunged from the record, whether in a suit, or bankruptcy; and without an application. *Ibid.*

9. Any proceeding may be referred for scandal and impertinence; as a state of facts before the Master, and affidavits in bankruptcy. *Erskine v. Garthshore*, Vol. xviii. 114.

10. Jurisdiction to expunge scandal from an affidavit in lunacy or bankruptcy, on reference to the Master. *Ex parte Le Heup*, Vol. xviii. 221.

11. Motion of course to refer a bill or answer for impertinence or scandal. *Ibid.* 223.

SET-OFF.

And see BANKRUPT, [U.]

1. At law there can be no set-off between joint and separate debts. *Ex parte Quinten*, Vol. iii. 248.

2. Equitable set-off upon mutual credit; though no mutual debts, upon which a set-off could be maintained at law. *James v. Kynner*, Vol. v. 108.

3. Bill by an insurance broker for a discovery and account of money paid and received by him in that capacity on account of the defendants, and money due to him for commission, &c. and for promissory notes indorsed to him, and to restrain an action, as brought contrary to the universal custom of the business. Demurrer allowed; the subject being matter of set-off, and capable of proof at law. *Dinwiddie v. Bailey*, Vol. vi. 136.

4. A. having directed her bankers to lay out a certain sum in the funds, which they fraudulently misrepresented to her they had done,

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and credited her half-yearly with the dividends; she afterwards joins her brother in a note to them for 1000*l.* and they subsequently become bankrupt. The assignees brought an action on the note against the brother alone. Upon bill filed by the brother and sister, the Court, considering her as a surety, and having a right before the bankruptcy to cancel the note, with the money for which they were her debtors, allowed her to set off the amount of the note, and to prove the residue under the commission. *Ex parte Stephens*, Vol. xi. 24.

5. Set-off allowed against a debt upon a sum of money borrowed under an express promise to pay. *Taylor v. Okey*, Vol. xiii. 180.

6. A debt from a bankrupt to a married woman, *dum sola*, cannot be set off against a debt from her husband to the bankrupt. *Ex parte Blagden*, Vol. xix. 465.

7. The benefit of a policy of insurance, previous to the bankruptcy of the insured, upon a loss after it, passes; and gives a right of action to the assignees, not capable of set-off against a debt from the bankrupt. *Ibid.*

8. Distinction between set-off in equity and at law. In equity it prevailed long before the statute. *Ibid.* 467.

9. The case *ex parte Stephens* (*ante*, Vol. ii. 24.) said to rest upon the fraud.

SEQUESTRATION.

1. *Quære*, Whether there can be any sale of goods, taken under a sequestration upon mesne process, farther than to pay the expenses. *Hales v. Shaftoe*, Vol. i. 86.

2. And where the estate was ordered to be sold for payment of debts, Court ordered money levied

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under a sequestration to be paid into Court, although the contempt was cleared. — *v. Bennet*, Vol. i. 89.

3. Bill for an account taken *pro confesso* against surviving executor and devisee in trust; and leasehold estates taken under a sequestration for want of an answer: the Court would not order the sequestrators to sell; but directed them to apply the profits. The Court also ordered the dividends of money in the bank on the testator's account to be paid under the will; but could not order the bank to transfer before the statute 36 Geo. 3. c. 90. *Shaw v. Wright*, Vol. iii. 22.

4. Appointment of a receiver in the place of the sequestrators, discharges the sequestration. *Ibid.* 22.

5. The Court will sell perishable commodities, rents paid in kind, or the natural produce of a farm. *Ibid.* 23.

6. Bill stating a sequestration for want of an answer prayed a discovery and account of all money or other property of the defendant in the original cause in the hands of the defendants, who were bankers, at the time of service of the sequestration, or since. Upon demurrer as to the money, and answer as to the rest of the bill, the Lord Chancellor determined against the demurrer upon the form, considering it overruled by the answer, and would not in that stage of the cause decide the two points: 1st, Whether a sequestration upon mesne process can be executed farther than to pay the expenses: 2dly, Whether a chose in action is liable to sequestration. *Simmonds v. Lord Kinnauld*, Vol. iv. 735.

7. Upon a sequestration a mortgage must come to be examined *pro interesse suo*. *Anon.* Vol. vi. 288.

8. It is a contempt to disturb sequestrators; *semble*, if the sequestration be executed, a judgment creditor, though prior, must come in to be examined *pro interesse suo*; but if not, there may be a levy under the execution. *Angel v. Smith*, Vol. ix. 337.

9. Notice of motion to sell goods and furniture under sequestration is necessary. *Mitchell v. Draper*, Vol. ix. 208.

SETTLEMENT.

And *see* MARRIAGE SETTLEMENT, *passim*.

1. Settlement, after marriage, of the wife's property, reciting, and in pursuance of, a parol agreement before, in trust as to part of the produce to the separate use of the wife; as to the rest, for husband for life, then for wife for life, then among the children, according to appointment of the survivor, good against creditors of the husband. Their bill to set it aside was dismissed with costs; and defendants were held entitled that judgment even against a plaintiff, who was made so without authority; but his whole expense, and also the whole expense above the costs, taxed of all the defendants except the husband, were decreed to be paid by the solicitor for plaintiffs; the transaction being considered as a combination between the husband, the creditors, who authorised the bill, and the solicitor, to defraud the children. *Dundass v. Dutens*, Vol. i. 196.

2. Charge well created by settlement, though for a volunteer, not revoked by general revocation of the uses under a power for the mere purpose of partition of joint estate and resettling to the same uses, the

separate part to be taken on partition. *Earl of Uxbridge v. Bayly*, Vol. i. 500.

3. Settlement of the wife's estate to such uses as the husband and wife, or the survivor, should appoint by deed or will, with three witnesses; in default thereof, to the heirs of the husband: the wife surviving, made a disposition by her will to a charity, and therefore void: decreed to the heir of the husband. *Attorney-General v. Ward*, Vol. iii. 327.

4. Covenant in a marriage settlement to settle leasehold estates in trust for such persons, and such and the like estates, ends, intents, and purposes, as far as the law would allow, as declared concerning real estates, limited to the first and other sons in tail male, with several remainders: the Court, in executing the covenant, declared, that no person should be entitled to the absolute property, unless he should attain twenty-one, or die under that age, leaving issue male. *Duke of Newcastle v. the Countess of Lincoln*, Vol. iii. 387.

5. Where, under a marriage settlement, a reservation was made to the husband to charge by his will, &c. held that it must be construed to extend to the estate in all the limitations of it, and not be confined merely to the reversionary interest, limited to himself. *Stackhouse v. Barneston*, Vol. x. 453.

Where settler executed the charge by will, conditionally, if the reversion expectant should never fall to him, held to be effectual, though the reversion came to his heir. *Ibid.*

6. Estates limited in strict settlement, and afterwards sold under the London Dock Act, and the purchase money paid into the bank until invested in land, held to be considered as land, though not laid out in the

husband's lifetime, there existing at his death a right to call for such re-investment. *Shard v. Shard*, Vol. xiv. 348.

7. Devise in strict settlement, with power to the tenants for life to jointure, on condition that two thirds of the portion should, upon such marriage, be settled, one third upon the eldest son of the marriage, and the other third upon the younger children. Upon the intention, that the settlement should be conformable to the limitations of the real estate, a trust for the father, for life, was established, and the interest of the eldest son was not to be divested except by his death under twenty-one without issue male. *Burrell v. Crutchley*, Vol. xv. 342.

SEWERS, COMMISSIONERS OF.

Injunction against the act of commissioners of sewers, reducing the height of water in a river, dissolved; there being a much shorter remedy by *certiorari* in the court of King's Bench; who interfere with great caution. Whether there may be cases in which a court of equity would interfere, *Quere. Kerrison v. Sparrow*, Vol. xix. 449.

SHIP.

1. Where a bill of sale was executed of a share in ship and freight, but the indorsement upon the certificate of the registry, according to the acts, was not made within ten days after the return of the ship into port; in consequence of the defendant proposing terms, the Court directed an issue as to whether such indorsement was prevented by fraud, the freight to be paid into Court, and the arbitration, as to damages, to proceed. *Quere*, If such indorsement were prevented by fraud, relief could be given in equity; what form, and whether it could be had as to the freight, not provided for by the registry acts, though the assignment of it were coupled with the ship, and comprised both in one instru-

ment? Assignment of freight alone not within the acts. *Mestaer v. Gillespie*, Vol. xi. 621.

2. Policy of the registry act being that there should be a public registry of ownership of all vessels navigating to and from the British dominions, accessible to all persons. *Quere*, If an equitable title to a ship can subsist? *Ibid*. 625.

3. Ship sold at sea, the vendee having done every thing required by the act that could be done before her arrival, previous to which the vendor becomes bankrupt, the vendee and not the assignees entitled. *Ibid*. 637.

4. Lien of the captain upon the ship, in respect of bills drawn and payments made for the necessary repair of the ship, while abroad, and in the course of her voyage, allowed, though there was no contract of hypothecation. *Hussey v. Christie*, Vol. xiii. 594.

5. For repairs done in this country the owners are personally liable, and the ship cannot be pledged without a special contract. *Ibid*. 599.

6. By the civil law, there is also a lien upon the ship itself for the repairs, and which follows the ship into the hands of different purchasers, in different countries, for different periods. *Ibid*.

7. The power of the master to hypothecate the ship, as well as cargo, must be for the benefit of the ship and cargo. *Ibid*.

8. Distinction as to an express hypothecation, by the law of England, does not take place as to repairs done abroad, and for this purpose Ireland, Jersey, and Guernsey are foreign countries. *Ibid*.

9. Where the bill of sale is not according to the terms prescribed by the 17 Geo. 3. c. 26. or if the indorsement is not made within the time limited after the arrival of the ship, the transaction is void at law, and to all intents and purposes; property, therefore, held to be vested in the assignees of a part-owner become

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bankrupt, and that they were entitled to an account. *Speldt v. Leckmere*, Vol. XIII. 588.

10. Nor will equity relieve in such case, as in the case of a defective conveyance. *Ibid.*

11. Lien for general contribution to individual loss by property thrown overboard for the safety of the ship, under the right of the master to require security, not extended to an injunction against delivering the cargo, receiving the freight, and parting with any share of the ship. The mode of adjustment not confined by usage to arbitration. *Hallet v. Bousfield*, Vol. XVIII. 187.

And see BANKRUPT, [U.] 1.—PARTNER, 15.

SHIP, EAST INDIA.

The command of an East India ship is a public trust; and the sale of it contrary to a public regulation of the company is a breach of public duty. *East India Company v. Neave*, Vol. v. 181.

SHIP, REGISTRY OF.

And see REGISTRY.—SHIP, 2. *sup.*

1. Where the interest in a ship is derived under the party's own act and contract, not executed according to the registry act, it cannot be reformed in equity any more than an annuity deed, not according to the annuity act. *Curtis v. Perry*, Vol. VI. 745.

2. Whether the ship registry acts 26 Geo. 3. and 34 Geo. 3. have any effect upon trusts implied or arising by operation of law, *Quere. Ib.* 746.

3. The registry of a ship is conclusive evidence of the property, upon the policy of the registry acts; even against the claim of creditors, upon a joint purchase and various acts of apparent ownership, within the bankrupt act, 21 Jam. 1. c. 19. § 10, 11. Distinction between transfers by the act of the parties, and by operation of law. *Ex parte Yallop*, Vol. xv. 60.

4. Policy of the registry acts. *Ib.* 66.

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5. The registry of a ship is conclusive evidence of the property, even between creditors; excluding all trusts created by act of the parties; as by payment of money in a purchase in the name of another. Distinction as to trusts arising by operation of law, upon bankruptcy, or death. *Ex parte Houghton and Gribble*, Vol. XVII. 251.

SHORT BILLS.

And see BANKRUPT, [Q.] 7, 8.

Short bills remitted to a banker, the property of the remitter, subject to acceptances, &c. on his account. *Waring, ex parte*, Vol. XIX. 349.

SIX CLERKS.

Under the order 18th June, 1668, regulating the office of Six Clerks, they are entitled to receive their proportion of the fee from the sworn clerk, though he has given credit to the client. *Ex parte the Six Clerks*, Vol. III. 589.

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And see AGREEMENT, *passim*.—

AWARD, 22.—FRAUDS, STATUTE OF, 7, *et seq.*—LACHES, 6—LEASE, 23.—VENDOR AND PURCHASER, *passim*.

[A.] WHERE DECREED.

[B.] WHERE REFUSED.

[A.] WHERE DECREED.

1. Small deviations from a building plan would not affect an agreement, in itself loose; but otherwise of any corrupt or obstinate deviation. *Craven v. Tickell*, Vol. 1. 60.

2. Specific performance of articles to grant a lease to the plaintiff decreed; though he had contracted to underlet, contrary to those articles. *Williams v. Cheney*, Vol. III. 59.

3. Objections by a purchaser by auction, 1st, that a way round and across a meadow was not specified; 2dly, on account of a bidding for the plaintiff; a specific performance was decreed with costs. *Oldfield Bowles v. Round*, Vol. v. 508.

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4. Bill for specific performance of a contract for sale of an estate upon various objections to the title dismissed in the first instance without a reference. *Omerod v. Hardman*, Vol. v. 722.

5. A small incumbrance, which may be the subject of compensation, no objection to a specific performance. *Guest v. Homfray*, Vol. v. 818.

6. Specific performance decreed: the abstract, though delivered very late, and under a notice, that the vendee would insist on his deposit with interest, if the title should not be made out, and possession delivered by the time of payment, having been received and kept without objection; and the vendee upon the construction and the circumstances not being entitled to insist on the time, as the essence of the contract. *Seton v. Slade*, Vol. vii. 265.

7. Execution of a contract on marriage by bond, with condition to settle all the personal estate that the husband should at any time during the coverture be possessed of. *Lewis v. Madocks*, Vol. viii. 150.

8. Specific performance of a covenant to make good a gravel pit refused. *Flint v. Brandon*, Vol. viii. 159.

9. Principle of specific performance, that the legal remedy is inadequate or defective. *Ibid.* 163.

10. Upon appeal the decree affirmed; on the ground, that the evidence did not prove satisfactorily, as it ought, especially in the case of married women, that the valuation was made with due attention and care. *Emery v. Wase*, Vol. viii. 505.

And see **BARON AND FEME**, [C.]

34.

11. Mere difference in value,

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though considerable, not of itself a sufficient ground for refusing a specific performance. *Ibid.* 517.

12. An agreement for 'the purchase of an estate binding, though signed only by the purchaser, and accompanied by a letter to his attorney to prepare a more formal instrument. *Fowle v. Freeman*, Vol. ix. 351.

13. There have been decrees founded merely upon letters, proposals never intended at the time to be a complete final agreement. *Ibid.* 355.

14. Where the contract has been entered into by a competent party, and in the nature and circumstances of it is unobjectionable, a specific performance decreed as much of course as damages at law. *Hall v. Warren*, Vol. ix. 608.

15. Where fraud is not proved, Court will not refuse to execute the contract on the mere ground of inadequacy of price. *Burrowes v. Locke*, Vol. x. 474.

16. The principle of the Roman law, as to such contracts, requires that the price should exceed half the value. *Ibid.* 475.

17. Specific performance decreed, notwithstanding a variance in the description, as lying within a ring fence; which being an object of sense, the purchaser must have known the fact: the principle is, that if he gets substantially that for which he bargains, he must take a compensation for a deficiency in value. *Dyer v. Hargrave*, Vol. x. 505.

18. Interest decreed upon the purchase-money for the time elapsed by the pendency of the suit, and a rent set upon the premises in respect of the vendor's possession. *Ibid.*

19. Upon submitting by answer to perform the contract, if a good title

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can be made, order of reference to the Master to see whether a good title can be made, and whether it appears upon the abstract. *Wright v. Bond*, Vol. xi. 39.

20. The report being against the title, bill was dismissed with costs, under circumstances, notwithstanding purchaser had taken possession, upon the representation of the vendor, without any advice upon the title. In a question of costs the Court looks at the answer. *Vancouver v. Bliss*, Vol. xi. 458.

21. Costs in equity do not follow the rule at law, but are in the discretion of the Court upon all the circumstances. *Ibid.*

22. Consequences of the distinction taken between a good title and one which a purchaser will not be compelled to take. *Ibid.* 465.

23. Upon a large purchase, objection to title as to six acres: specific performance decreed with compensation. *McQueen v. Farquhar*, Vol. xi. 467.

24. Party may have specific performance of part of an agreement where the whole cannot be executed, and defendant cannot object. *Mestaer v. Gillespie*, Vol. xi. 640.

25. On a bill for specific performance of an agreement for purchase of lands, contained in letters, which the Court considered an agreement on both sides, the answer amounting to an admission of the letters stated in the bill, no objection could be taken under the stamp acts, and the defendant refusing to produce the office copy of the record, held, that the draft signed by counsel could not be read, but that the Court could sustain the decree for performance, by stating that it was made "upon inspecting the record of the bill." *Huddleston v. Eriscoe*, Vol. xi. 583.

26. The distinction is, that if the

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agreement is one upon which no action is to be brought unless it is stamped, it must be stamped before action brought; but if it is an agreement which you may get stamped, paying the penalty, then it may be stamped pending the action. *Ibid.* 595.

27. The Court will not decree performance unless it can collect, upon a fair interpretation of such letters, that they import a concluded agreement; if doubtful, the Court will leave the contract to be enforced at law. *Ibid.* 592.

28. *Quere*, If the Court would perform a contract signed only by one party, and nothing having been done upon it? *Ibid.*

29. Specific performance is granted upon the principles of compensation and indemnity; but not if the effect is to operate a substantial deviation from the original contract. The origin of the jurisdiction being a legal title; but the modes of administering justice in courts of law not giving complete relief there. *Halsey v. Grant*, Vol. xiii. 73. *S. P. Hornblow v. Kirby*, *Ibid.* 83.

30. But where time is not the essence of the contract, or a material object, execution of the contract will be decreed, though the lapse of time is considerable, and not the effect of accident. *Hearn v. Tenant*, Vol. xiii. 289.

31. Where a plaintiff offers to perform the specific agreement which he represents, the Court will dispense with a cross bill, which was the old course. *Fife v. Clayton*, Vol. xiii. 546.

32. Upon an agreement to let premises, stipulating that the rent should not be raised, nor the party turned out so long as the rent was paid, and no injurious business carried on; on bill for spe-

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sific performance and general demurrer, the Court held that whether it might turn out such an agreement or lease as the Court would execute or not, and whether there was enough in the body of it to show the terms, the case was not so clear as that the demurrer should be allowed. *Brown v. Warner*, Vol. xiv. 106.

The injunction against the ejectment afterwards continued. S. C. *Ibid.* 409.

33. Agreement for a lease, in part performed by possession taken, though without express assent, acquiesced in, and expenditure permitted: specific performance, according to the plaintiff's evidence, against the assertion of a right of resumption by the answer, and one witness: not proving that it was admitted. *Gregory v. Mighell*, Vol. xviii. 328.

34. Specific performance, the lapse of time being trifling, and the result of fraud. *Savage v. Brock-sopp*, Vol. xviii. 335.

35. The relief by a delivering up a contract, requires a stronger case than to resist a specific performance. *Ibid.*

36. Specific performance against a purchaser under a power of sale in a mortgage deed, without the mortgagor, though under a covenant to the mortgagee to join in a sale, without costs, the only authority produced not being in print. *Corder v. Morgan*, Vol. xviii. 344.

37. To a bill for specific performance of an agreement a plea of the statute of frauds, being coupled with another defence, was ordered to stand till the hearing. *Cooth v. Jackson*, Vol. vi. 12.

38. Bill for specific performance of a parol agreement to grant a farm lease with the usual and customary covenants of the neighbour-

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hood, and an injunction to prevent an ejectment; the plaintiff having taken possession. Upon the answer, stating the insolvency of the plaintiff and various breaches of the agreement during five years' possession, to the ruin of the estate, the injunction was continued on an undertaking to give judgment in ejectment, go to commission, and set down the cause for next term, paying the rent into Court. Defendant also insisting on a covenant not to assign, that is the subject of inquiry as to the custom of the neighbourhood. *Boardman v. Mostyn*, Vol. vi. 467.

39. Decree for specific performance of an agreement to grant a lease, rejecting one term for such conditions, &c. as shall be judged proper by J. G.; and substituting a reference to the Master: the agency of J. G. not being of the essence of the contract. *Gourlay v. the Duke of Somerset*, Vol. xix. 429.

[B.] WHERE REFUSED.

1. Bill for specific performance of an agreement dismissed; the agreement appearing, from letters produced, to have been different from that set up by the bill, and proved by one witness. *Leigh v. Haverfield*, Vol. v. 452.

2. Specific performance refused on account of the laches of the plaintiff, the vendor. *Guest v. Homfray*, Vol. v. 818.

3. A party who has contracted for a freehold estate cannot be compelled to take a leasehold estate, though a term of 4000 years. *Drew v. Corp*, Vol. ix. 368.

4. Where trustees with power to sell appointed one of the *cestui que trust* their agent in the sale, who assented to a contract of sale upon the representation of the auctioneer, without knowledge of a revaluation,

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Court, on the grounds of breach of trust in the trustees, and of gross negligence in the agent, refused to lend its aid to enforce specific performance, leaving the plaintiff to his remedy at law. *Mortlock v. Buller*, Vol. x. 292.

5. The Court is not bound to enforce every contract it will not set aside, nor deliver up or set aside every contract it will not enforce. Agent's authority may be by parol, though the agreement must be by writing. *Ibid.* 311.

6. Court refused to enforce a contract for purchase of what was described as the residue of a term, free from incumbrances, it appearing to be only the residue of a few years of an old term, and a reversionary term from a different lessor, in investigating whose title old incumbrances appeared not to be discharged. *White v. Foljambe*, Vol. xi. 337.

7. In a case of clear misapprehension and mistake, the Court will exercise its discretion as to enforcing specific performance. *Quere*, As to sales by auction, not being within the statute of frauds. *Mason v. Armitage*, Vol. xiii. 25.

8. Specific performance seldom granted in the case of chattels; so for agreements to transfer stock. *Ibid.* 37.

9. Not decreed at any distance of time; the principle of jurisdiction being, that the party had a legal right to a performance of the contract; but not to prevail, unless the party will have substantially that which he contracted for. *Sem- ble*, The doctrine of compensation has been carried to too great an extent. *Alley v. Deschamps*, Vol. xiii. 225.

And see S. C. *Ibid.* 289.

10. Where the objection to a specific performance, viz. that no

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title could be made to part of the premises, which were the inducement to purchase, failed, reference to the Master was directed. Where the party establishes such a fact, he will be relieved from the contract altogether. *Stapylton v. Scott*, Vol. xiii. 425.

11. A mistake of both parties avoids the contract at law, as well as equity; but where it is occasioned by the mistake of the purchaser, to which he was not led by the vendor, case is very different, though the Court has a discretion. *Ibid.*

12. Where by the laches of the party, and subsequent alterations of the property, it could not be enjoyed according to the stipulations at the time of making the contract, specific performance refused. *City of London v. Mitford*, Vol. xiv. 41.

13. Construction of covenant for renewal. *Ibid.*

14. An agreement for sale at a valuation to be ascertained by two persons, and in case of dispute, by an umpire chosen by them; the specific mode failing, the Court refused to appoint a person to set the valuation, or otherwise ascertain it. *Milnes v. Gery*, Vol. xiv. 400.

15. An agreement to sell at a fair valuation, no particular means being pointed out, may be executed; but the Court will not extend the cases, when they have modified the subordinate parts of such agreements. *Ibid.* 407.

16. A fixed price is an essential ingredient in every contract of sale. *Ibid.*

17. Trustees of a charity filing a bill to enforce a parol agreement for a lease for 60 years, held that it was competent for defendant to offer evidence of an alteration in the terms entered into at the same time with the written agreement, and be-

fore it was signed, and upon the faith of which it was executed. *Clarke v. Grant*, Vol. xiv. 519.

18. No specific performance of a covenant to repair. *Hill v. Barclay*, Vol. xvi. 405.

19. No specific performance of an agreement to refer to arbitration. Under particular circumstances, as in the case of the opera-house, and a brewery where there were many partners, the parties were left to the remedy they had chalked out for themselves; the Court refusing all interposition; not acting through the agency of the arbitrators, appointing them to take the accounts, and adopting their decision as the decree. *Gourlay v. Duke of Somerset*, Vol. xix. 431.

And see AWARD, 18.

STAMP.

See SPECIFIC PERFORMANCE, [A.]

24.—VENDOR AND PURCHASER, [A.] 25.

STATUTE.

And see INFANT, 24.

1. Where the enacting part is doubtful, the preamble may be applied to, to throw light on it. *Mason v. Armitage*, Vol. xiii. 36.

2. Distinction between acts of parliament, denying legal effect to be instruments, as the act for in-rolling bargains and sales, and the registry act, (7 Anne, c. 20.) and acts, declaring instruments void to all intents; as the annuity and the ship-registry acts. Notwithstanding the former, the party is bound in equity by the contract. *Davis v. Earl of Strathmore*, Vol. xvi. 428.

3. General words in a statute must receive a general construction, unless there is in the statute itself

some ground for restraining their meaning by reasonable constructions, not by arbitrary addition or retrenchment. *Beckford v. Wade*, Vol. xvii. 91.

4. The preamble of an act of parliament, though it may assist ambiguous words, cannot control a clear and express enactment. *Lees v. Summersgill*, Vol. xvii. 508.

And see SPECIFIC PERFORMANCE, [B.] 8.—LEGACY, [D.]

STOCK.

1. Bequest of stock, if the testator has it at the time, it is specific; and any act destroying it, proves an intention to revoke. If a ring or picture bequeathed cannot be found, that cannot be rectified. *Selwood v. Mildmay*, Vol. iii. 310.

2. Specific legacy of stock decreed according to the value at the time it ought to have been transferred. *Morley v. Bird*, Vol. iii. 628.

3. Transfer of stock by way of loan upon bond, with condition to replace the stock six months after the date, and in the mean time to pay interest at 5 per cent. The stock not being replaced, and being depreciated, the obligee is entitled to the value of the stock at the time of the transfer, with interest at 5 per cent. to the date of the report; credit being given for some payments on account of the principal. *Forrest v. Elwes*, Vol. iv. 492.

4. In an action recently after breach of an agreement to transfer stock, the rise, if any, would be given in damages. *Ibid.* 497.

5. The 3 per cents. are perpetual annuities granted for ever, redeemable by the public. The common expression, therefore, of "100l.

stock," &c. is incorrect. *Kirby v. Potter*, Vol. iv. 751.

6. The 5 *per cent.* annuities of 1797, created upon the subscription of the Bank for the public service, and in pursuance of a resolution of the Bank divided among the proprietors of the Bank Stock *pro rata*, are considered as an accretion to the capital; and therefore a person entitled for life can have the benefit of it by way of dividend only. *Brander v. Brander*, Vol. iv. 800.

7. Stock included in a will under the word "*securities*;" legacies being charged, for which the securities properly so called were not sufficient. *Dicks v. Lambert*, Vol. iv. 725.

8. Stock bequeathed by a will without two witnesses is subject, in the hands of the executor, to the directions of the will; even for the purpose of a residuary bequest. *Ripley v. Waterworth*, Vol. vii. 440.

9. Trustees under a foreign will dead; and no personal representation taken out in this country: not a case for relief by directing a transfer of stock within the stat. 36 Geo. 3. c. 90. *Lee v. Bank of England*, Vol. viii. 44.

10. This Court will not enforce the specific performance of an agreement for a transfer of stock. *Nutbrown v. Thornton*, Vol. x. 161.

11. Stock how got at, in the administration of assets. *Rider v. Kidder*, Vol. x. 369.

12. A bequest of stock to a married woman for her life to permit her to receive to her sole use, give receipts, &c.; held that she might dispose of a part of such interest, and that such sale was not a grant of an annuity, or within the scope or exceptions of the act. *Browne v. Like*, Vol. xiv. 302.

13. Demurrer allowed to a bill by the Bank of England for an injunction against the action of an exe-

cutor claiming a transfer of stock. Considering the stock as specifically bequeathed (which was doubtful) to trustees in France upon special trusts, if the executor cannot maintain the action, upon the nature of the bequest, or as having assented, the injunction is unnecessary: if he can; upon his title to the stock, to be applied as the other property, there is no equity. *Bank of England v. Lunn*, Vol. xv. 569.

14. Stock not liable to the payment of debts during the life of the proprietor in any way except under a commission of bankruptcy. *Ib.* 577.

15. Direction for sale or transfer of stock without attention to the rise or fall: the party must take it, as it happens at the time of appropriation. *Ex parte Pye and Dubost*, Vol. xviii. 140.

16. Indefinite bequest of the dividends gives the absolute property of stock. *Page v. Leapingwell*, Vol. xviii. 463.

And see *BARON AND FEME* [D.] 13.

SUPERSTITIOUS USE.

1. Legacy to such purposes as the superior of a convent or her successor may judge most expedient, void as a superstitious use. *Smart v. Prujean*, Vol. vi. 567.

2. The statute 1 Edw. 6. c. 14: relates only to superstitious uses of a particular description then existing. *Cary v. Abbott*, Vol. vii. 495.

SURETY.

And see *BARON AND FEME*, [C.] 31.
BANKRUPT [K.] 56, *et seq.*

1. Any evidence of conversation between principal and surety at the time of raising the money is evidence to rebut. *Clinton v. Hooper*, Vol. i. 179.

2. A surety admitted under the

bankruptcy of his principal as to all recovered against him and his costs, there being a surplus. *Ex parte Mills*, Vol. II. 302.

3. Obligee in a bond with a surety without communication with the surety takes notes from the principal, and gives farther time: the surety is discharged. *Rees v. Berrington*, Vol. II. 540.

4. Creditor sues the principal by direction of the surety, but without his privity agrees to stay execution: the surety is discharged. *Ibid.* 544.

5. A surety to the East India Company discharged by payment of a balance to the principal, under an erroneous settlement by the officers of the Company, without their authority or knowledge. *Law v. East India Company*, Vol. IV. 824.

6. The East India Company having compelled payment from a surety in India by their power over him as one of their servants, without an account or proceeding against the principal (though solvent), and otherwise under harsh circumstances, he was restored to the same situation by a decree for repayment, with interest at 5 per cent. upon giving security for repayment in case in a future suit by the Company he should be held liable; but the Court would not give Indian interest. *Ibid.*

7. Proof by obligee under a commission against the principal at the request of the surety, securing the obligee by paying the amount of the bond into a banker's. *Leers, ex parte*, Vol. VI. 646.

8. A surety may be sued in the first instance: but if the creditor sues the principal first, and gives time, the surety is discharged. *Wright v. Sanpson*, Vol. VI. 734.

9. Surety, depositing the money and indemnifying against expense, &c. may compel the creditor to go

against the principal, and even to prove under a commission of bankruptcy for the benefit of the surety. *Ibid.*

10. The discharge of a surety by the creditor has not the effect of a discharge of the principal without reserve: and therefore a co-surety is not discharged. When it is ascertained, what each of the co-sureties has paid beyond his proportion, the equity as between them is arranged upon the principle of contribution for the excess. *Ex parte Gifford*, Vol. VI. 805.

11. Grounds of the decision, that a discharge of the principal debtor, without a reserve of the remedy against the surety, discharges the surety. *Ibid.* 807.

12. Where bankers being about to advance money to A. upon his bond, in which B. was joined as surety, and not being satisfied, applied to C. to become surety for the due satisfaction of such bond; held that the latter was only a supplemental security, and was not liable with them but only in the event of their default, and therefore not within the equity between co-sureties for contribution. *Craythorne v. Swinburne*, Vol. XIV. 160.

The right of sureties to call for contribution depends upon a principle of equity rather than of contract, except so far as it may be inferred from the implied knowledge of that principle by all persons. *Ibid.* 164.

The equity may be limited by the extent of their respective contracts, as where they engage for different sums, so the surety may contract by special engagement so as not to be liable in any degree. *Ibid.*

Evidence is admitted to show who is the principal and who is the surety, and so it may be admitted

to show that the equity ought not to be applied, or the contract not inferred. *Ibid.* 171.

13. Undertaking in writing to guarantee the debt of another, within the statute of frauds, without stating the consideration as between the creditor and surety. *Ex parte Gardom*, Vol. xv. 286.

14. Under the guarantee of a bill of exchange, expressly as if the surety had indorsed it, the bill not being due until after his bankruptcy, no proof; actual indorsement being necessary. *Ibid.* 288.

15. Composition, with reserve of the remedy against sureties, valid; but must plainly appear. *Boulbee v. Stubbs*, Vol. xviii. 22.

SURRENDER.

See COPYHOLD, *passim*.

SURVIVORSHIP.

See BARON AND FEME, [E.]—LEGACY, [F.]—PARTNERS, 3.—WILL [B.] 65.

SALES.

1. The Court refused to make an order under an act of parliament for the sale of estates upon the opinion of a conveyancer, approving a conveyance, without a reference to the Master. *Ex parte the Duchess of Newcastle*, Vol. vi. 454.

2. The Court, on the ground of convenience, often sells property which subsequently perhaps it would have been unnecessary to sell, as real estates, before it can know the real situation of the personal estate, looking at its own powers of setting right the interests of all parties as

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among each other. *Lloyd v. Jones*, Vol. ix. 65.

SHORT BILLS.

And see BANKRUPT, [Q.] 15.

Short bills remitted to a banker, the property of the remitter, subject to acceptances, &c. on his account. *Waring, ex parte*, Vol. xix. 349.

SIX CLERKS.

Under the order 18th June, 1668, regulating the office of Six Clerks, they are entitled to receive their proportion of the fee from the sworn clerk, though he has given credit to the client. *Ex parte the Six Clerks*, Vol. iii. 589.

SEWERS, COMMISSIONERS OF.

Injunction against the act of commissioners of sewers, reducing the height of water in a river, dissolved; there being a much shorter remedy by *certiorari* in the court of King's Bench; who interfere with great caution. Whether there may be cases in which a court of equity would interfere, *Quere. Kerrison v. Sparrow*, Vol. xix. 449.

TENANCY IN COMMON.

And see DEVISE, 52.—WILL [B.] 18, *et seq.*

1. An estate in common cannot be so settled on the marriage of one as to prevent the right of the other to make partition. *Abel v. Heathcote*, Vol. ix. 100.

2. Testatrix gave stock to trustees on trust to pay the dividends to her niece for life, and after her decease that the stock should be equally

divided among the brother and four sisters of the testatrix, and in like manner among the survivors or survivor of them. The niece was residuary legatee. This is a tenancy in common between those alive at the death of the niece and the representatives of such as died in her life. *Roebuck v. Dean*, Vol. 11. 265.

3. "Equally" makes a tenancy in common. *Davenport v. Hanbury*, Vol. 111. 260.

4. No action of trover between tenants in common. *Binford v. Domett*, Vol. iv. 760.

5. The Court, on appeal, held, that the course of dealing for twelve years was to be taken as evidence of an intention to sever the joint tenancy, and that from the time they were let into possession, they were to be considered as tenants in common of their father's property embarked in trade, as well the capital as the profits, and the decree was altered accordingly. *Jackson v. Jackson*, Vol. ix. 591.

6. Tenancy in common under the words "equally divided." *Jenour v. Jenour*, Vol. x. 569.

TENANCY IN TAIL.

And see DEVISE, 87.—ELECTION, 25.—EXONERATION, 1.—FINE, 2.—INFANT, 16.—RECOVERY, 2.—WASTE, 14.

1. Trustees having laid out the fund upon a bad security, obtained from the debtor, under circumstances unfavourable, and to the prejudice of other creditors, a charge on his estate under a power; their bill to enforce the charge against the son, tenant in tail under the marriage settlement, was dismissed with costs. *Bradbury v. Hunter*, Vol. 111. 187. 260.

2. Tenant in tail in remainder entitled by the death of a prior te-

nant in tail without issue, may continue the suit of the former tenant in tail by a supplemental bill, and have the benefit of the former proceedings. *Lloyd v. Johnes*, Vol. ix. 37.

3. Upon a purchase under a decree to which the former tenant in tail was a party, though affected by notice and irregularity, yet not set aside in favour of the subsequent tenant in tail in remainder. *Ibid.*

4. And where the prior tenant in tail had paid off an incumbrance by the sale of one estate under a decree, and by which he might have barred the remainder man, the Court held there should be no contribution in his favour. *Ibid.* 64.

5. A decree against a person representing the inheritance, is binding upon all remainders behind him, by analogy to the law in recoveries, where a subsequent remainder man is vouched without prejudice to the intermediate remainders; all remainders behind may be barred. *Ibid.*

6. Purchase by tenant for life not impeached on general principles. *Ibid.* 53.

7. The rule that it is sufficient to bring the first tenant in tail before the Court, was established for convenience. *Ibid.* 55.

8. Issue of tenant in tail party to a suit may appeal against the decree; so remainder man may bring a writ of error. *Ibid.* 56.

9. A court of equity in many cases considers the tenant in tail as having the whole estate vested in him at least for the purposes of suit, and for those purposes does not look beyond the estate tail in a suit aiming by the decree to bind the right to the land. *Ibid.*

10. Distinction between where the suit is founded upon contract by the tenant in tail, and a suit to bind the land in respect of charges created

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by the author of the gift and imposed upon all who take, in which latter case, the subsequent remainder man has a clear interest in the event of the suit of the prior tenant in tail. *Ibid.* 57.

11. Equity will in many cases, not all, admit a plea of dismissal upon the merits to bar a remainder man in tail of a new estate tail under the same gift, as well as a person claiming the same estate; upon the principle, that those who are entitled to the inheritance shall have the benefit and disadvantage of a proceeding by him who represents it. *Ibid.* 58.

12. Where bill claims a charge upon the whole inheritance in strict settlement and created by the author of the gift, and the first tenant in tail be made a party and he dies without issue, by the practice all the proceedings are had against the second son as if he had been originally a party. *Ibid.*

13. So where an intermediate remainder man comes *in esse*, and such subsequent defendant is entitled to the benefit of the testimony which has been given, if the witnesses should die. This principle must be applied both for and against the tenant in tail, subject to this, that when he takes a similar interest not affected by the same circumstances, it is competent for him to bring forward the equities belonging to those circumstances as contradicting his case. *Ibid.* 60.

14. Where the object of a trust under a marriage settlement terminated with the life of the wife, and a remainder was limited over to the same trustees for a term of years; held that such trust, though expressed in terms creating a fee, was yet limited to the life of the tenant for life; and a subsequent remainder over to the heirs of the body of the

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tenant for life was therefore a legal estate, and capable of uniting with the previous life estate, vesting an estate tail. *Curtis v. Price*, Vol. xii. 89.

15. The rule in Shelly's case only requires that the ancestor shall take an estate of freehold, and afterwards in the same conveyance an estate shall be given to his heirs, and an estate during widowhood is a sufficient estate of freehold. *Ibid.* 99.

16. The statute 11 H. 7. c. 20. cannot apply to the case of a fine by a *feme covert* of lands *ex provisione viri*, when the heir in tail himself joins with his mother, either in the fine or in the deed, declaring the uses. *Ibid.* 97.

17. *Quere*, In tail of an estate for lives barred by release. *Moody v. Walters*, Vol. xvi. 313.

18. Residuary trust by will to apply the rents and profits for *A.* during his life, and afterwards for the heirs of his body, if any; and in default of such issue over, an estate tail in the real estate: and the absolute interest in the personal. *Elton v. Eason*, Vol. xix. 73.

19. Devise to the use of the deviser's second son, *A.* for life, without impeachment of waste, and from and after his decease to the heirs of his body, to take as tenants in common and not as joint-tenants; and in case of his decease without issue to the deviser's eldest son *B.* his heirs, &c.; and in case both sons should die before twenty-one, over: an estate tail in the land, and absolute interest in personalty, bequeathed with it. *Bennett v. Earl of Tankerville*, Vol. xix. 170.

20. Necessary construction of a devise over upon death without issue an indefinite failure of issue; and the intention of preferring all the issue to the remainder man cannot be ef-

fected in any other way than by an estate tail. *Ibid.* 178.

21. Devise to *A.* for life: remainder to trustees to preserve contingent remainders: remainder to the heirs of his body, with remainders over for life, and in tail male; declaring that the respective devises to *A.* &c. "and to their respective heirs male," are on condition of taking the testator's name; the residue of the personal property bequeathed to *A.* on attaining the age of twenty-four; to go over, if he died under twenty-four without leaving any child or children living at, or born in due time after, his death. Codicil giving an after-purchased leasehold for years for such estate and estates and in such manner and form as the real estates are devised by the will; and with, under, and subject to, the like limitations, trusts, conditions, &c. *A.* takes an estate tail in the freehold, and the absolute interest in the leasehold, estates. *Browncker v. Bagot*, Vol. xix. 574.

22. Right of the first tenant in tail to the absolute interests in personal property bequeathed to go as heir-looms with real estate. *Ibid.* 580.

23. Estate with furniture of the house limited to *A.* and such heir of her body as should be living at her death, and in default of such remainder over, an estate tail; and consequently the absolute interest in the furniture. *Ibid.*

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

Instances of tenant in tail after possibility of issue extinct, in possession, or of a remainder or reversion. *Williams v. Williams*, Vol. xv. 423.

And see WASTE, 14.

TENANCY FOR LIFE.

And see DEEDS [C.] 89.—LEGACY [N.] 16.—PURCHASE, 8.—REMAINDER MAN, 2.—RENEWAL.—TRUST ESTATE, 1.—WASTE, 1. 11.—WILL [C.] 62.

1. Tenant for life punishable for waste, without power under an inclosing act, to mortgage for the expense of inclosure, felled timber and applied the produce instead; decreed to account to the owner of the next estate of inheritance, but costs refused. *Lee v. Alston*, Vol. i. 78.

2. Inclosure under an act must not be *ad libitum*, as pleasure grounds, &c. *Ibid.*

3. General rule as to paying off incumbrances by tenant for life, not broken through on account of inconvenience. *Countess of Shrewsbury v. Earl of Shrewsbury*, Vol. i. 234.

4. Tenant for life having made a lease of coal mines amounting to forfeiture, cannot join the remainder man in a bill for injunction. *Wentworth v. Turner*, Vol. iii. 3.

5. Tenant for life liable to waste, having sold timber, cannot prevent the vendee from cutting it. *Ibid.*

6. The old rule imposing upon the tenant for life a gross sum, part of the capital of incumbrances, is at an end; but he takes subject to all the interest. *Lord Penrhyn v. Hughes*, Vol. v. 107.

And *vid. sup.* 3.

7. In general the tenant for life must now contribute beyond the interest, in proportion to the benefit he takes: but where the testator gave a fund for renewal to the extent of 500*l.* and did not mean to impose on the tenants for life the burthen of renewing, as they might become *cestui que vies*, if that fund would not enable them, held they were bound to permit a mortgage for raising that fund, and ought to

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have kept down the interest. *White v. White*, Vol. ix. 554.

8. The statute 11 Geo. 2. c. 19. § 15. does not apply to apportion the payment of land tax, quit-rents, &c. between tenant for life and remainder man. *Sutton v. Chaplin*, Vol. x. 66.

9. Bequest to a woman of a fund, with the interest thereon, to be vested in trustees, the income arising therefrom to be for her sole use and benefit, vests the capital for her separate use. *Adamson v. Armitage*, Vol. xix. 416.

10. In a devise of real estates, words of limitation required to give more than an estate for life; as are words of qualification to restrain the extent and duration of the interest in personal property. *Ibid.* 418.

11. Bequest of the produce of a fund is a gift of that produce in perpetuity, and consequently of the fund itself, unless not the intention on the face of the will. *Ibid.*

12. Intention extremely imputable, to give the same person first the estate for life, and afterwards the fee; but that is often the legal effect, whatever may be the intention: and the limitations may be so consistent as to carry the fee, and not so uncertain as to let in the heir. *Chambers v. Brailsford*, Vol. xix. 655.

13. Tenant for life without impeachment of waste, farther than wilful waste, entitled to the interest of money produced by the sale of decaying timber cut by order of Court. As to any farther claim, a question at law, *Quere.*

The capital laid out in real estate, to be settled to the same uses. *Wickham v. Wickham*, Vol. xix. 419.

14. On application of all parties, the expense of an inclosure was defrayed out of money produced by sale of decaying timber cut by order of the Court. *Ibid.* 423.

THEATRE.

TENANCY YEARLY.

And see BANK STOCK, 2, 3.

1. Tenancy from year to year is an interest transmissible to representatives. *James v. Dean*, Vol. xv. 241.

2. The interest of tenant from year to year is transmissible to representatives. *Ibid.* Vol. xi. 393.

TENDER.

See WAIVER.

TERM.

1. Where a term would, by its union with the inheritance, merge, the testator having an equitable title to the latter by contract for the purchase made subsequent to his will, held that the term attended the inheritance, and that the residuary legatees had no claim under the term against the heir. *Capel v. Girdler*, Vol. ix. 509.

An estate contracted for, passes by a subsequent devise of all lands. *Ibid.*

2. When the purposes of a trust are once satisfied in equity, the ownership of the term belongs to the owner of the inheritance, whether declared by the original conveyance to attend it or not. *Maundrell v. Maundrell*, Vol. x. 270.

And see POWER, 72.

THEATRE.

1. Although an agreement to refer disputes to arbitration is generally no objection to a suit in a court of equity, yet, upon the nature of the subject, the management of the Opera-House, and the anxious provision of the parties for arbitration, the Court refused, upon motion, to interfere before they had taken that course. *Waters v. Taylor*, Vol. xi. 10.

TIMBER.

2. The principle upon which a court of equity interferes between partners by appointing a manager, receiver, &c. is merely with a view to the relief, by winding up and disposing of the concern, and dividing the produce; not to carry it on. The Court, therefore, would not, upon motion, appoint a manager, &c. of the Opera-House, except upon the principle applicable to any other partnership, as necessary to the relief, a foreclosure; taking into consideration also the difficulties, from the nature of the subject and the contract, an anxious provision for arbitration, and that one party was, by the express contract, manager. *Ibid.*

3. Jurisdiction in the case of a theatre considered as a partnership. *Morris v. Coleman*, Vol. xviii. 437.

4. Contract with the proprietors of a theatre not to write dramatic pieces for any other, legal; as a similar restraint of a performer would be; not resembling a covenant restraining trade generally. *Ibid.*

TIME.

See CONTRACT, *passim*.

TIMBER.

And see ACCOUNT, 13.—COPYHOLD,

11. 24.—ESTATE FOR LIFE, 5, 6.

—INJUNCTION, *passim*. — LUNACY, 4. 9. 12.—TENANCY FOR LIFE, 1. 5.—WASTE, *passim*.

1. Order made to prevent the removal of timber wrongfully cut. *Anon.* Vol. i. 93.

2. If a bailiff cuts timber without authority, and before it is sold the party dies, it is personal assets, and the heir has no action against the personal representative; no equity between them. *Oxenden v. Lord Compton*, Vol. ii. 74.

TITHES.

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TIME.

1. No general rule, in computing time from an act or event, that the day is to be inclusive or exclusive; depending on the reason of the thing, according to circumstances. *Lester v. Garland*, Vol. xv. 248.

2. In the time from the presentment of a bill of exchange, the day of presentment is inclusive. Other instances, where the day of an act done, or an event happening, is sometimes exclusive, sometimes inclusive. *Ibid.*

Our law rejects fractions of a day more generally than the civil law does. *Ibid.* 257.

TITHES.

1. Bill to establish the rector's right, and for an account: the defence, though informally stated as a prescription *de non decimando*, in a *que estate*, was as to two-thirds, possession by the lord of the manor, under an apparent title by various conveyances, &c. stated from 37 Hen. 8. of the lands, with tithe generally, or two-thirds specifically, with evidence of reputation and notice to the plaintiff, who had purchased the advowson, and was lessee of the tithes, but the commencement of the title did not appear; bill was dismissed with costs. *Strutt v. Baker*, Vol. ii. 625.

2. An account of tithes is consequential upon the legal right; and therefore, if the least doubt is thrown upon it by *prima facie* evidence, the account cannot be decreed till the right is established at law. *Fowcroft v. Parris*, Vol. v. 221.

And see ACCOUNT, 13.—PLEADING, 22.

3. Bill for tithes. Answer admitting the right to one-third, and submitting to account, and claim-

ing the other two-thirds under a title derived by a grant by Queen Elizabeth; submitting to be examined upon interrogatories, but not setting forth a description of the lands. The defendants having gone into evidence in support of their claim, pressed to have the bill dismissed generally: the plaintiff pressed for a general account. The Master of the Rolls decreed an account as to one-third; and as to two-thirds, the plaintiff declining to try the right at law, dismissed the bill. *Ibid.*

4. Issue directed on a modus for certain lands, amounting to 1s. per acre for all tithes, notwithstanding the apparent rankness. *O'Connor v. Cook*, Vol. vi. 665.

5. Rankness of a modus is only evidence, not an objection in point of law. *Ibid.* 672.

6. Distinction as to rankness, between a modus for tithe of particular things and a farm modus. *Ibid.*

7. And afterwards a new trial granted. Verdict for the plaintiff. S. C. Vol. viii. 535.

8. Rankness of a modus a question of fact. *Ibid.* 536.

9. Upon the rankness of a modus, the *quantum* of the payment is not decisive, if immemorially paid. *Ib.* 539.

10. The Court refused to grant a new trial, after two trials at bar had, upon an issue whether any, and what less sum than 2s. 9d. had been paid, although material evidence, which ought to have been received, had been rejected; neither that nor any other proving a certain payment in lieu of tithes. *Warden, &c. of St. Paul's v. Morris*, Vol. ix. 155.

11. The Court may grant a new trial, after trial at bar, upon the principle, that the conscience of the Court must be satisfied. *Ibid.*

12. The right of deciding without any issues is to be exercised tenderly. *Ibid.*

This Court has granted new trials after trials at bar, where courts of law would not grant them. *Ibid.*

13. If a party puts himself upon one modus in his defence, and proves another at the hearing, there is a decree against him. *Ibid.*

Customary payment in lieu of tithes need not be immemorial. *Quære*, If eight years, or what period, be sufficient? *Ibid.* 165.

14. When a party of whom tithes had been demanded by the parson, according to the statute Hen. 8. but no suit instituted, alleged a customary payment, but did not state what it was, and prayed, by his bill, discovery and relief, demurrer allowed, but permission given to amend. *Gordon v. Simkinson*, Vol. xi. 509.

15. Where warehouses were erected on the scite of ancient houses in London, formerly occupied at low rents, some of which were not known, and no specific customary payments were stated in the answer, decree was made for payment of 2s. 9d. in the pound upon the value, and a reference to the Master directed. *Antrobus v. East India Company*, Vol. xiii. 9.

16. Reference, whether several tithe causes should be consolidated, not of course, before answer. *Keighley v. Brown*, Vol. xvi. 344.

17. To a bill for tithes, even by a lay impropiator, prescription *in non decimando*, or presumption from mere retainer, without colour of title, is no defence, and will not be sent to law. *Berney v. Harvey*, Vol. xvii. 119.

18. Issue directed to try moduses, alleged variations in some of the payments appearing to be only irregularities in the collection. *Blackburn v. Jepsen*, Vol. xviii. 473.

19. As to a modus of 1*d.* for tithe of all hay, *Quære. Ibid.*

20. Modus for every garden and orchard, in lieu of all tithes, of all titheable matters or things arising therein, sufficiently laid without stating them to be ancient gardens, &c., and not too extensive. *Ibid.*

21. Modus of 4*d.* by each occupier having lands cultivated by the plough by three or more horses, usually called a plough, in lieu of all small prædial tithes of all such lands so cultivated, bad for uncertainty as to the quantity of land. *Ibid.*

22. Modus disproved by the evidence: for every cow producing a calf, 1½*d.*; or if no calf, 1*d.*: the evidence proving a higher payment beyond a certain number. Account of tithes decreed. *Ibid.*

23. Modus supported by the evidence in part, not as to the rest, and capable of distinction, void *in toto*, viz. so much for every calf, up to seven, proved; and different sums proved from those laid, as to other numbers. *Ibid.* 478.

24. Annual payment of 1*d.* by each occupier for tithe of hay. *Leyson v. Parsons*, Vol. xviii. 173.

25. Modus for turnips bad, being of too recent introduction into this country to be the subject of immemorial usage. *Ibid.*

TITLE.

And see VENDOR AND PURCHASER, *passim*.

1. Exception to a report in favour of a title, on the ground that the reversion in fee might have been disposed of, so as not to have descended to the heir, from whom the title was derived, over-ruled. *Sperling v. Trevor*, Vol. vii. 497.

2. The abstract is complete, when it appears, that upon certain acts done, the legal and equitable estates

will be in the purchaser, though long before the title can be completed. *Lord Braybroke v. Inskip*, Vol. viii. 417.

TITLE DEEDS.

1. Title deeds are incident to the possession of a freehold estate. *Wakeman v. Duchess of Rutland*, Vol. iii. 225.

2. Title deeds delivered out of Court, upon the application of the trustees and the tenant for life. *Duncombe v. Mayer*, Vol. viii. 320.

TOLLS.

Upon a bill for an account of tolls, the right being first established at law, held that the Court had a concurrent jurisdiction, and general demurrer over-ruled. *Corporation of Carlisle v. Wilson*, Vol. xiii. 276.

TRESPASS.

And see INJUNCTION, *passim*.

1. The jurisdiction against waste by injunction and account, applied to trespass, by exceeding a limited right to enter and take stone from a quarry: being a destruction of the inheritance; as in the case of timber, coal, &c.; and the distinction between waste and trespass therefore disregarded. *Thomas v. Oakley*, Vol. xviii. 184.

2. Formerly, before injunction was applied to the case of trespass, upon the death of the party an account was given: the trespass dying with the person. *Ibid.* 186.

TRIAL.

See PRACTICE [O.]

TROVER.

And see ESTATE FOR LIFE, 6.—
TENANCY IN COMMON, 2.

Trover does not lie for one not

having the property, nor against one in possession under, and making sale by, order of the owner; for conversion is the gift of it; and if no conversion at moment of sale, refusal afterwards will not do. *Weymouth v. Boyer*, Vol. 1. 418.

TRUST ESTATE.

And see CHARITY, 52.—ELECTION, 44.—EQUITABLE ESTATE.—FRAUDS, STATUTE OF, 4, 5, 6.—REMAINDERS, 1.—TENANCY IN TAIL, 13.

1. Tenant for life, subject to a trust term, not let into possession before account; nor till the trust is executed, unless on paying into Court a sum sufficient to answer it; or where the best way of performing the trust appears to be by letting him into possession. *Blake v. Bunbury*, Vol. 1. 194.

2. Payment in name of A. with his money raises a trust; but it is an equity which may be rebutted by evidence. *Ibid.* 275.

3. Where testator desires all his money may be disposed of in land, or *vice versa*, it is a direct trust, and will be executed in equity. *Walker v. Denne*, Vol. 11. 176.

4. Trust raised under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death. *Malim v. Keighley*, Vol. 11. 333. 529.

5. Testator, by showing his desire, creates a trust, unless plain words or necessary implication that there is to be a discretion to defeat it. *Ibid.* 335.

6. The testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter A. out of the same, as long as she, his wife, should live, and at her decease to dispose of what shall be

left among his children in such manner as she shall judge most proper. There is not an absolute trust for the children after the death of the wife. *Pushman v. Filliter*, Vol. III. 7.

7. Under a commission of charitable uses, it was agreed, that copyhold lands, formerly surrendered for maintenance of a minister in W. chapel should be let, and the rents employed towards maintenance of the minister to be chosen and appointed by the inhabitants, and presented and allowed by the lord of the manor, who, upon complaint, might give the minister half-a-year's warning, and if he had not reformed by that time, might remove him; information prayed that the lord might be decreed to allow and approve of the candidate who had the majority of votes, which was refused on the ground of misconduct; and the evidence clearly proving it, a new election was directed: upon which the same candidate being returned, and producing strong affidavits of good conduct for the last six years, the decree stating the affidavits, declared, that in consequence of them, the relator deserved the approbation of the trustees. *Attorney-General v. Marquis of Stafford*, Vol. III. 77.

8. A general devisee in trust for testator's widow and children, having received from the widow (executrix), on her going abroad to recover part of the property, bonds for a debt from him and his partners to the estate, in settling the affairs of the partnership on the retirement of one who had notice of the trust, delivered to him the bonds to be cancelled, without the privity of the *cestui que trust*, continuing to make remittances on that account from the funds of the new partnership: the partner who retired held

not discharged. *Dickenson v. Lockyer*, Vol. iv. 36.

9. The Court will not interfere between representatives, by changing the nature of property in execution of a trust, the object of which has failed. *Croft v. Slee*, Vol. iv. 60.

10. Trustee for the purchase of land died without personal assets, but having purchased land, the estates were held not liable to the trust; the circumstances affording no presumption that they were purchased in execution of the trust. *Perry v. Phelps*, Vol. iv. 108.

11. Bill by the heir at law against residuary devisees, legatees, and executors, suggesting a secret trust, undertaken at the request of the testator, either not legally declared, or if so, void as to the real estate, and written acknowledgments by the defendants of an intended trust for charitable purposes: the will also by equal legacies to them, and some particular expressions importing a trust. A general demurrer to the discovery and relief was overruled. *Muckleston v. Brown*, Vol. vi. 52.

12. In general cases, trusts will not fail by the failure of the trustee. *Ellison v. Ellison*, Vol. vi. 663.

13. Words of recommendation not considered imperative, unless the objects and subject are certain. *Moggridge v. Thackwell*, Vol. vii. 85.

14. Where any act is to be done, as a conveyance to be made, the estate is a trust, not a use executed. *Mott v. Buzton*, Vol. vii. 201.

15. Words of recommendation, or precatory, or expressing hope, &c. if the objects and subject are certain, are imperative, and create a trust. *Paul v. Compton*, Vol. viii. 380.

16. By a devise in general terms

a trust estate will pass, unless an intention to the contrary can be inferred from expressions in the will or purposes or objects of the testator. *Lord Braybroke v. Inskip*, Vol. viii. 417.

And see TRUSTER, 9.

17. When the Crown, by letters patent, granted the booty, &c. taken in war in moieties, one to the East India Company towards their expenses, and the other in trust, to be divided amongst the officers and men, &c. leaving open the consideration of the mode of distribution, held that the Court considering the defendants as trustees, had jurisdiction, but that the letters patent had not gone far enough to create rights in the individuals, and make them *cestui que trust*, with a title such as the bill supposed them to have. *Brown v. Harris*, Vol. xiii. 552.

18. Purchase in the name of another, a trust for the party who pays the consideration, except by a parent in the name of a child, which is presumed an advancement. The presumption capable of being rebutted, but does not give way to slight circumstances. *Finch v. Finch*, Vol. xv. 43.

19. Conveyance to B. of an estate, the money being paid by A.; B. is a trustee, and C. taking from B. with notice. *Mackreth v. Symmons*, Vol. xv. 350.

20. Trust not disappointed by the failure or negligence of the trustee. *Bar v. Whitbread*, Vol. xvi. 26.

Residuary devise and bequest for such of the testator's relations and kindred, in such proportions, &c. as his executors should think proper; recommending and advising his said trustees and executors to give the greatest share to such person and persons, who, in their opinion and judgment, should ap-

pear to them to be his nearest relations, and the most deserving, declaring his intention not to controul their discretion; but that every thing relative to that disposition, who were his relations and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them.

A trust and a power. The ground of the power being personal confidence, it is *primâ facie* limited to the original trustees; not without express words passing to others, to whom by legal transmission the same character may happen to belong; and cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee. A trust, therefore, executed by the Court for the next of kin at the death of testator, according to the statute of distributions. *Cole v. Wade*, Vol. xvi. 27.

21. Precatory words held imperative, where the object and subject are certain. *Dashwood v. Peyton*, Vol. xviii. 41.

22. Bill by heir, suggesting a secret, void, trust for charity in residuary devisees, but without evidence of a trust expressed, or of an engagement, expressed or tacit, preventing it, dismissed with costs, unless the heir would take an issue, to which he is entitled. *Paine v. Hall*, Vol. xviii. 475.

23. Devise, to a nephew in fee, "not doubting, in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister, in such part or parts, and manner, as he shall think fit, in preference to any descendant on his own female line." Trust, in the event described, for the sister's children. *Parsons v. Baker*, Vol. xviii. 476.

TRUSTEE.

24. Purchases held not a substitution for estates sold under a power in a settlement to sell, and invest the money in estates to be settled to the same uses, there being no original trust, subsequent agreement, or representation relied on. Account decreed of the money produced by the sale, not of the present value. *Denton v. Davies*, Vol. xviii. 499.

25. Recommendation in a will, where the object and subject are certain, amounts to trust. *Tibbits v. Tibbits*, Vol. xix. 664.

26. No trust under words of recommendation and confidence, applied to an uncertain subject; as what shall be left after the death of a person to whom the property is given in the first instance. *Ibid.*

TRUSTEE.

And see EXECUTOR [B.]—FRAUD, 13.—INFANT TRUSTEE.—RECEIVER, 9. 13. 31.—RENEWAL, 10.

[A.] PRIVILEGES AND DUTIES.

[B.] APPOINTMENT — SUBSTITUTION—REMOVAL.

[C.] LIABILITY.

[D.] NOT A PURCHASER.

[A.] PRIVILEGES AND DUTY.

1. Terms to raise by rents and profits: trustees may raise by sale or mortgage. *Countess of Shrewsbury v. Earl of Shrewsbury*, Vol. i. 234.

2. The Court views trustees with jealousy; and in case of two estates, one in trust, the other belonging to the trustee, will not permit him to act for his own or infant's benefit as he pleases. *Wilkinson v. Stafford*, Vol. i. 43.

3. Trustee mistaking his power, sold stock without authority: decreed to replace it immediately; if

at a less price, to invest the surplus in the same stock to the same uses. *Earl Powlet v. Herbert*, Vol. I. 297.

4. Bill being dismissed without costs, as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill, cannot have costs against plaintiff; but left to their remedy against their principal: otherwise, perhaps, if plaintiff had prevailed; because then those costs might have been given over against other defendants. *Brodie v. St. Paul*, Vol. I. 326.

5. No act of the trustee can vary the right of the *cestui que trust*; but his situation may; as where the *cestui que trust* is his heir, the right to dower depends upon which dies first. *Selby v. Alston*, Vol. III. 341.

6. Devise of a copyhold (duly surrendered) to A. and his heirs in trust for B. and his heirs: upon the death of B. without heirs, the heir of the trustee has no equity to compel the lord to admit him; and his bill was dismissed without costs. *Williams v. Lord Lonsdale*, Vol. III. 752.

7. Settlement, upon marriage, of stock, the property of the wife, in trust, from time to time to receive the dividends, and pay them into the hands of the wife for her sole and separate use, her receipt to be a discharge; after her decease, if the husband should survive, for him for life; and after the decease of the survivor, to transfer the principal among the children, according to her appointment by will; in default thereof, equally; if no children, according to her appointment by will. The trustees, with the privity of the wife, sold the stock and paid the money to the husband, taking his bond of indemnity: he died insolvent. Upon the bill of the widow and children, the fund being replaced by the trustees, was trans-

ferred to the Accountant-General upon the trusts of the settlement; the trustees to pay the dividends to the widow from the death of the husband, with costs. *Whistler v. Newman*, Vol. IV. 129.

8. The Court refused to order court rolls, &c. to be delivered by the steward appointed by the trustees to the steward of the testamentary guardian; there being no suggestion of improper conduct or advantage from the change. *Mott v. Buxton*, Vol. VII. 201.

9. A general devise by a trustee does not pass the trust estate. *The Attorney-General v. Buller*, Vol. V. 339.

10. A trustee and executor, though taking under the will a commission as a satisfaction for his trouble, entitled to allowances under a general trust to set and manage as he should think proper, and out of the rents and profits to pay all rates and taxes, charges of repair, stewards', bailiffs', and game-keepers' salaries and expenses, and all other charges and expenses he should think proper. But he was not allowed to appoint an establishment, game-keepers, &c. except as the due management required. Inquiry therefore directed as to that; and whether the liberty of sporting during the continuance of the trust could be let for the benefit of the *cestui que trust*: if not, the game belongs to the heir. *Webb v. Earl of Shaftesbury*, Vol. VII. 480.

11. The indemnity of the trustees under a deed of trust does not give the persons employed by them a right as creditors against the trust fund. *Worrall v. Harford*, Vol. VIII. 4.

12. Upon an assignment of a term to trustees for the benefit of creditors, upon trust, that they should from time to time let the

premises to the best advantage, and the trustees accordingly demised, with covenants to renew; held, under the circumstances, and with reference to the value of the premises at the time, such renewable lease was not inconsistent with the covenant to manage to the best advantage, and specific performance of such renewal decreed. *Kirkham v. Chadwick*, Vol. xiii. 547.

13. Trustees to preserve contingent remainders, joining in a recovery, held, with reference to the circumstances and occasion, no breach of trust. *Moody v. Walters*, Vol. xvi. 283.

14. Generally trustees joining to destroy the contingent remainders before the tenant in tail is of age, a breach of trust. *Ibid.* 307.

15. Executors and trustees charged for negligence by joining in a transfer to a co-executor, upon his representation that it was required for debts: but not liable so far as they can prove the application to that purpose; though he possessed other funds, not through them; which funds he wasted. *Lord Shipbrook v. Lord Hinchinbrook*, Vol. xvi. 477.

16. As to the cases, breaking down the distinction between executors and trustees joining in an act, by which one obtains and misapplies the fund, that executors are all liable, trustees not, as the former need not, and the latter must, join, *Quære*. *Ibid.* 479.

17. Devise to trustees for ninety-nine years upon the trusts herein-after expressed; and from and after the expiration, or other sooner determination of the said term, in strict settlement. The term, no trust being declared, decreed to attend the inheritance, according to the limitations of the will, and no resulting trust for the heir, upon

the apparent intention to devise immediate estates, subject to the term, not future estates, expectant on its determination. *Sidney v. Shelley*, Vol. xix. 352.

18. One executor can do any act: not one trustee. *Rigby, ex parte*, Vol. xix. 463.

19. In equity, undertaking to execute trusts equivalent to execution of the deed; and the general words, "it is declared and agreed," amount to covenant. *Lord Montford v. Lord Cadogan*, Vol. xix. 638.

20. Tenant for life joining in a breach of trust, answerable in the first instance. *Ibid.* 632.

[B.] APPOINTMENT—SUBSTITUTION—REMOVAL.

1. Decree discharging from a trust a woman who had married a foreigner, though the answer denied an intention of quitting the kingdom; and stated her desire of continuing in the trust. *Lake v. De Lambert*, Vol. iv. 592.

2. Testator directed a new trustee to be appointed if either should die or become incapable of acting: one absconded on a charge of forgery, but was not outlawed: referred to the Master to appoint a new one. *Millard v. Eyre*, Vol. ii. 94.

3. One of the trustees, under an act of parliament being gone abroad, and having released, there being no provision for the change of the trustees, upon a bill, it was referred to the Master to appoint a new trustee. *Buchanan v. Hamilton*, Vol. v. 722.

4. Where by neglect the number of trustees in a trust to present to a living, was not filled up at the time of an avoidance, the Court would not, by injunction, prevent the effect of a presentation under the legal title of the heir of the surviving trustee, without a special

ground: but the Court will take care as to the future, that the trust shall be properly filled up. *Attorney-General v. Bishop of Lichfield*, Vol. v. 825.

5. The Court controls a trustee in the exercise of a power to appoint new trustees, though given in very large words. *Webb v. the Earl of Shaftesbury*, Vol. vii. 480.

6. A provision, in case of the death of a trustee, for the substitution of another, and a conveyance by the survivor, so that he and the new trustees should be jointly interested in the trust, satisfied by the substitution of two trustees, after the death of both the former, and a conveyance by the heir of the survivor. *Morris v. Preston*, Vol. vii. 547.

[C.] LIABILITY.

And see COSTS, 3, 4. 6. 17.—TENANCY IN TAIL.

1. Account decreed against a trustee, who having engaged the trust property in an adventure, afterwards renounced it for the trust, and declared it to be on his own account, though no part of the trust money actually laid out. *Wilkinson v. Stafford*, Vol. i. 32.

2. Trustee not answerable for having applied the trust property even to what turned out a losing adventure, if without fraud or negligence. *Ibid.* 41.

But having so engaged the property, he cannot sell to himself or another. *Ibid.* 42.

3. So not answerable for having engaged the infant's name in an adventure, if afraid of the consequences, he does not engage the property. *Ibid.*

4. Trustees are mere stakeholders, and cannot be affected with more than they actually received, without wilful default. *Pybus v. Smith*, Vol. i. 190.

5. Trustee charged with interest for wilful misconduct in not paying money into Court, pursuant to an order: but slight difference in the sums reported in his hands is not enough; nor will farther inquiry be directed but on a strong case. *Sammes v. Rickman*, Vol. ii. 36.

Nor will he be deprived of costs in respect of misconduct. *Ibid.*

6. Costs refused to a trustee setting up a trust different from what it really was; but general misconduct, &c. is not a sufficient ground. *Ball v. Montgomery*, Vol. ii. 192.

7. Bank stock was purchased by the government of Maryland before the American war, and vested in trustees for the discharge of certain bills. After the peace, upon a bill under an assignment by the new state of part of the stock, as a compensation to mortgagees of lands that were confiscated, the fund subject to that assignment was claimed by the new state; and there being no claim under the bills, the whole was claimed by the surviving trustee beneficially; also by the proprietary under the old government; and a specific lien was insisted on in respect of losses by confiscation occasioned by the refusal of the trustees to transfer: held, that there was no lien; that the new state could take only such rights of the old as were within their jurisdiction; that the claims of the plaintiff, the state, and the confiscations were the subject of treaty, not of municipal jurisdiction; and the fund, no object of the trust existing, must be at the disposal of the Crown. *Barclay v. Russell*, Vol. iii. 424.

8. Executors directed with all convenient speed to pay debts and lay out the residue on mortgages, held not answerable for a loss by the insolvency of the testator's banker, after selling negotiable se-

curities deposited with him by the testator. *Routh v. Howell*, Vol. III. 565.

9. Trustee of stock sells it: the *cestui que trust* has an option to have the stock or the produce, with interest. *Forrest v. Elwes*, Vol. IV. 497.

10. Trustee charged with interest. *Younge v. Combe*, Vol. IV. 101.

11. Executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, the *cestui que trusts* have an option to have the stock replaced, or the money produced by the sales, with interest at five per cent. or more, if more has been made by it, and the costs occasioned by his misconduct. *Pocock v. Reddington*, Vol. V. 794.

12. Executor in trust for infants having paid under a written obligation executed abroad, though in possession of a counter-obligation to repay part, with interest, at the death of the party, acknowledging that to be so much more than the debt, and neither instrument having been transferred, was charged as having been paid incautiously, though innocently; and therefore he was permitted to try the question at law. *Vez v. Emery*, Vol. V. 141.

13. On motion, a reference directed to inquire, whether the defendant, a trustee, remains accountable for any acts done by him as trustee, and if not, to settle a release. — *v. Osborne*, Vol. VI. 455.

14. Trustees charged with a loss occasioned by their negligence, though without any corrupt motive. The costs followed of course. *Caffrey v. Darby*, Vol. VI. 488.

15. Bill to charge a trustee, as having, by delivering the title deeds to the tenant for life, enabled him to make a mortgage of a settled

estate as tenant in fee, dismissed; the fraudulent purpose of enabling him to mortgage resting upon the evidence of a single witness, and being positively denied by the answer, as far as the allegations of the bill gave an opportunity of answering: but without costs, on the ground of negligence; and without prejudice to an action; and with an option to the plaintiff to take an issue. *Evans v. Bicknell*, Vol. VI. 174.

16. Trustee not charged with a loss by the failure of the banker to the agent, in whose hands the money was deposited, pending a transaction for the change of a trustee. *Adams v. Claxton*, Vol. VI. 226.

17. General rule, that he, who bargains in matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence. *Gibson v. Jeyes*, Vol. VI. 278.

18. Decree for execution of a trust to pay debts against the trustees: the other defendant not appearing, upon process to sequestration. *Downes v. Thomas*, Vol. VII. 206.

19. Trustee making a false representation of the right of his *cestui que trust* to make an assignment, held responsible: and the court of equity has a concurrent jurisdiction with the courts of law in cases of misrepresentation. *Burrowes v. Locke*, Vol. X. 475.

20. Where a trustee joined in a sale under a power without necessity, and permitted his co-trustee to keep the money in his hands in opposition to the trust, held that he was chargeable to the *cestui que trusts*, but not as to the interest of one who had notice of the misapplication, and acquiesced. *Brice v. Stokes*, Vol. XI. 319.

21. Distinction between executors and trustees joining in receipts for money received in fact by one. *Ibid.* 324.

22. If the executor do any act, whereby his co-executor gets possession of the property, both are equally liable; but not where one is merely passive. *Langford v. Gascoyne*, Vol. xi. 333.

23. Trustee charged with interest at 5 per cent. upon a misrepresentation that the money was laid out in stock, accounting for the dividends, and settling an account as for stock, though there was no such fund. *Bate v. Scales*, Vol. xii. 402.

24. Costs to defendant, a mere trustee by consignment of goods, as to plaintiff in bill of interpleader, not as between attorney and client, but according to the course of the Court as between party and party. *Dunlop v. Hubbard*, Vol. xix. 205.

[D.] NOT A PURCHASER.

1. There is no general rule that a trustee to sell shall not be himself the purchaser; but he shall not thereby gain a profit to himself: one of several trustees to sell having purchased, and afterwards sold at a profit, was therefore decreed to account for that profit, with costs. *Whichcote v. Lawrence*, Vol. iii. 740.

2. One trustee for sale of an estate having released and conveyed to his co-trustee, refused to join in the receipt of the purchase-money: upon the special expression of the deed, the purchaser was not held to the agreement with the remaining trustee; it would have been otherwise if one had merely renounced. *Crewe v. Dicken*, Vol. iv. 97.

3. There is no rule that a trustee to sell cannot be purchaser; but, however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in a reasonable

time, to have a resale; unless the trustee, to prevent that, purchases under an application to the Court. *Campbell v. Walker*, Vol. v. 678.

4. General rule upon a purchase of trust property by the trustees on their own account, that at the option of the *cestui que trust* it shall be resold; being put up at the price at which the trustees purchased; who, if there is no advance, shall be held to their purchase. *Lister v. Lister*, Vol. vi. 631.

5. To set aside a purchase by a trustee of the trust property, it is not necessary to show that he has made an advantage. Principle of the general rule. *Ex parte James*, Vol. viii. 348.

6. Principle on which a purchase by a trustee from the *cestui que trust* may be supported. *Coles v. Trecothick*, Vol. ix. 246.

7. Purchase by trustees of trust property set aside, although after a considerable lapse of time. To constitute an exception to the rule, they ought to show notice to the *cestui que trust*, distinct information to him, and acquiescence after that distinct information communicated. *Randall v. Errington*, Vol. x. 423.

8. Principles on which courts of equity hold that trustees shall not buy. *Ex parte Bennett*, Vol. x. 385. 393.

9. It is not necessary, in order to undo a sale to a trustee, to show that he has made any advantage in the purchase. *Ibid.* 393.

10. The principles apply with more force to assignees than to any other class of trustees. *Ibid.* 395.

11. Trustee keeping the property of his *cestui que trust*, effect of long acquiescence under the sale. *Parkes v. White*, Vol. xi. 226.

12. A trustee for sale may enter into a contract with his *cestui que trust*, that with reference to the contract of purchase they shall no longer stand

in the relative situation of trustee and *cestui que trust*; but this cannot be done where they are infants. Where the sale was effected through the medium of a trustee, though without fraud, and by auction, the sale was set aside with costs: the circumstance of its having been by auction will make no difference. *Saunderson v. Walker*, Vol. XIII. 601.

And see ATTORNEY AND CLIENT,
4.—CORPORATION, 1, 2. 4.

TRUST, BREACH OF.

To constitute felony, breach of trust is not sufficient. There must be a felonious taking. But that is satisfied by an act not warranted by the purpose for which the property was delivered; as a tailor taking notes out of a pocket-book left in the pocket of a coat delivered to him to mend: or a hackney coachman in whose coach it was left, &c. *Cartwright v. Green*, Vol. VII. 409.

UNDERWRITING.

Court refused an account in the profits of underwriting, being illegal under 6 Geo. 1. c. 18. § 12. *Knowles v. Houghton*, Vol. XI. 168.

USE.

1. The decisions, that where the uses to convert personal into land are united with the fund in the same person, it shall be considered as land without a declared contrary intent, have gone too far; for in that case the uses are merged, there being no person to call for the application. *Rashley v. Masters*, Vol. I. 204.

2. At common law the use was intended to be in the feoffee or co-

USURY.

nusee; and is not averred, as it must be if to the use of the feoffor, &c. *Cave v. Holford*, Vol. III. 666.

3. Conveyance by one seised *ex parte maternâ*, the use results in the same manner: so if expressly limited to him. *Ibid.* 667.

4. Devise, charged with debts, to trustees and their heirs; in trust to receive and take the rents, issues, and profits; and thereout to support and educate the devisor's son till the age of twenty-one; and then to him. Not a use executed in the son before the age of twenty-one. *Bailey v. Ekins*, Vol. VII. 322.

And see SUPERSTITIOUS USE.—
EXECUTORY TRUST.

USURY.

1. Agreement by A. to purchase houses from B. for 431*l.* 10*s.* possession to be given, and 200*l.* paid, immediately, the rest with interest at Michaelmas: but if not then paid, A. to pay "in lieu of interest upon the same a clear rent of 4*l.* per annum," out of which was to be deducted interest for the 200*l.* paid: not usurious. *Spurrier v. Mayoss*, Vol. I. 527.

2. Usury is taking more than the law allows upon a loan, or for forbearance of a debt. *Ibid.* 531.

3. *Post obit* bonds, though upon terms of gross inequality, established; such securities not being liable to be impeached on the ground of usury. *Wharton v. May*, Vol. V. 27.

4. A reasonable commission beyond legal interest for extra incidental charges, as upon agency in the remittance of bills, is not usurious. *Baynes v. Fry*, Vol. XV. 120.

5. Contract for repayment of a debt with legal interest, or, at the option of the creditor, to transfer so much stock as it would have pro-

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duced on the day it was payable, void, as usurious: the principal and interest being secured, with a chance of a rise of the stock; not therefore like a contract to replace stock absolutely, which might fall. *Barnard v. Young*, Vol. xvii. 44.

6. Relief against usury upon the terms of paying what is due. *Dalbiac v. Dalbiac*, Vol. xvi. 124.

VALUABLE CONSIDERATION.

See PURCHASE, 6.—VENDOR AND PURCHASER, [B.] 23. 24. 51, 52.

VALUATION.

Valuation not regulated by *pretium affectionis*. *Montesquieu v. Sandys*, Vol. xviii. 312.

VARIANCE.

Allegation of the bill, that the plaintiff, the tenant, was to pay taxes and do necessary repairs, not proved, is no substantial variance; being an admission against himself, and immaterial from a tenant's legal liability. *Gregory v. Mighell*, Vol. xviii. 328.

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And see LIEN, 9. 12.—SPECIFIC PERFORMANCE, *passim*.—TRUSTEE, [C.] 19.

[A.] RIGHTS AND LIABILITY OF VENDOR.

[B.] RIGHTS AND LIABILITY OF PURCHASER.

[C.] REFERENCE TO MASTER.

[A.] RIGHTS AND LIABILITY OF VENDOR.

1. A vendor cannot come at any

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distance of time for a performance; but upon a bill filed fourteen months after the correspondence upon the objections to the title having ceased by the defendant's returning no answer to the last letter, calling for a distinct answer, and threatening a bill, and the auctioneer not having been called on to return the deposit, it was referred to the Master. *The Marquis of Hertford v. Boore*, Vol. v. 719.

2. In the case of a bargain and sale without enrolment, the vendor will be compelled to make a title. *Curtis v. Perry*, Vol. vi. 745.

3. A person having resort to two funds shall not by his choice disappoint another having only one: the Court, upon this principle, extended the benefit of vendor's lien on the estate for the purchase-money to third persons, against the claim of the heir. *Trimmer v. Bayne*, Vol. ix. 209.

4. Trustees under a power of sale, having bound the estate, although by events the contract cannot be exacted under the power, shall be made good by those who have acquired the interest. *Mortlock v. Buller*, Vol. x. 315.

5. Where vendor has not a title at the date of the contract, shall have specific performance if he can have a title before the report. *Ibid.*

6. Vendor having only a partial interest, contracts and represents to sell the whole estate as his own; vendee, if he chooses to take as much as he can have, has a right to that, and to an abatement. *Ibid.* 316.

7. Warranty not binding at law where the defect is obvious. *Dyer v. Hargrave*, Vol. x. 507.

8. Upon sale before the Master, upon opening biddings, but before the report confirmed, the premises were damaged by a fire; held, that the

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loss must fall upon the vendor. *Ex parte Minor*, Vol. xi. 559.

9. Upon sale of timber, purchaser, upon being declared, to give security, which condition was never complied with; he took away part, and paid part of the purchase-money, and subsequently became bankrupt. *Quære*, If the condition was thereby waived, and the right of stoppage *in transitu* gone by such delivery in part? Court directed the vendor to sell the rest of the timber, and the assignees to bring trover; if they succeeded, to have the proceeds paid over to them; if not, the vendor to retain it, and prove for the residue. *Ex parte Gwynne*, Vol. xii. 379.

10. The circumstance of the vendors employing a person to bid for them at the auction, with instructions not to let the premises go under certain specified prices, it appearing that, as assignees, they only endeavoured to prevent a sale at an under-value, and no fraud was contemplated, held not to vitiate the sale, and specific performance decreed. *Semble*, Otherwise if done for enhancing the price, Court will not admit evidence attempting to introduce a different defence than that made by the answer. *Smith v. Clarke*, Vol. xii. 477.

11. Where a vendor, not being prepared to make the title at the time appointed, received notice from the vendee that he had invested the money in the stocks, to which no answer was returned for two years and a half; but having risen, they then claimed the stock: held, that having never assented to the risk, and could not have been fixed with a loss if it had arisen, they could not claim the advantage. *Roberts v. Massey*, Vol. xiii. 561.

12. There is no rule that if the vendor cannot make a title at the

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date of the report, the purchaser has a right to be discharged. If the report be that a good title can be made within a reasonable time, or on the vendor getting in a term, administration, &c. the Court will put him under terms of procuring such speedily. *Coffin v. Cooper*, Vol. xiv. 204.

13. Vendor's lien for purchase-money unpaid against the vendee, volunteers, and purchasers with notice, or having equitable interests only, claiming under him; unless clearly relinquished; of which another security taken, and relied on, may be evidence; according to the circumstances, the nature of the security, &c.: the proof being upon the purchaser, and failing in part, upon the circumstances, another security being relied on, may prevail as to the residue. As to marshalling the assets of the vendee by throwing the lien upon the estate, *Quære*. *Mackreth v. Symmonds*, Vol. xv. 329.

14. Vendor's lien probably derived from the civil law as to goods; which goes farther than the law of England; by which the lien, giving the right to stop *in transitu*, is gone; where possession, actual or constructive, has been taken: the lien by the civil law prevailing even against actual possession. *Ibid.* 344.

15. Lien of vendee having paid prematurely, analogous to that of vendor. *Ibid.* 345.

16. Lien, where either conveyance or payment was by surprise. *Ibid.* 353.

17. Whether, after a contract for sale of an estate the vendor, selling to a purchaser for valuable consideration without notice, is not accountable for the money as a trustee, *Quære*. *Daniels v. Davison*, Vol. xvi. 249.

18. Injunction restraining vendor,

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defendant to a bill for specific performance, from conveying the legal estate. *Echcliff v. Baldwin*, Vol. xvi. 267.

19. Outstanding term, to attend the inheritance, the trusts being performed, may be an objection to the conveyance; not to the title. *Berkeley v. Dann*, Vol. xvi. 380.

20. Sale of a trade, with the good-will, does not prevent the vendor's setting up again a similar trade, without express covenant or fraud, by representing it as a continuation of the old trade, or by conduct encouraging others to involve themselves, in the confidence that he would not trade again, &c. *Cruttwell v. Lye*, Vol. xvii. 335.

21. Whether the effect of advertising for sale a lease in possession is precisely the same as a declaration that the vendor cannot produce the lessor's title, *Quere. Deverell v. Lord Bolton*, Vol. xviii. 512.

22. Approbation of counsel not a waiver of all reasonable objections to the title. *Ibid.* 514.

23. Implied covenant by vendor of a freehold estate for the title, though an assignee under a commission of bankruptcy, selling by a general description, not restrained to his actual interest. *Ibid.* 512.

24. Vendor and vendee proceeding in treaty beyond the time for completing the contract, the vendor having brought an action and withdrawn his record, not having got in a judgment amounting to half the purchase-money, refused an injunction. *Wood v. Bernal*, Vol. xix. 220.

25. Purchaser not to be compelled to take an indemnity against a judgment amounting to half of the purchase-money. Distinction of a small incumbrance on a considerable estate. *Ibid.* 221.

26. On the report against vendor's

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title, his bill for a specific performance dismissed with costs on motion. *Walters v. Pyman*, Vol. xix. 351.

27. Possession by a purchaser according to the contract not a ground for payment of the money into Court on objections to the title; acts of alteration, or destruction, against the nature of the contract, are; and slighter acts, after the objections discovered, effectual for that purpose, than if done with an understanding on one side that there is a title, on the other that there is not. *Dixon v. Astley*, Vol. xix. 564.

And see BANKRUPT, [I.] 10.

[B.] RIGHT AND LIABILITY OF PURCHASER.

And see COPYHOLD, 36.—NOTICE.

1. Advertisement of an estate for sale by auction described it all as freehold, though a small part was held at will; after execution of articles, a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase, purchaser took possession forcibly; but proceeded in the treaty afterwards, till he finally refused to agree to the purchase: on bill of vendor, purchase-money decreed to be paid, with 4 *per cent.* from the time it ought; but inquiry directed as to what ought to have been the compensation at that time for the part not freehold; that with the outgoings to be deducted. *Calcraft v. Roebuck*, Vol. i. 221.

2. A purchaser cannot be compelled to take an equitable estate. *Abel v. Heathcote*, Vol. ii. 100.

3. Purchaser not entitled to a conveyance of part, though answering the general description in the advertisement of sale, purchaser

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being referred to a more particular one, which did not include that part, and the surrender having been made pursuant to that and his own instructions. *Calverley v. Williams*, Vol. I. 210.

4. If one party thought he had purchased *bonâ fide* part of an estate, which the other thought he had not sold, it is a ground to set aside the contract; if both understood the whole was to be conveyed, it must; otherwise if neither did so. *Ibid.* 211.

5. A party undertaking to describe, is bound by the description, whether conusant or not. *Ibid.* 213.

6. A small variation in a general description of land is not material. *Ibid.*

7. Relief against forfeiture of the deposit upon putting the other party in the same situation, as if the contract had been performed at the time agreed. *Moss v. Matthews*, Vol. III. 279.

8. The bill praying an inquiry into the title and a specific performance, on the defendant's motion after answer an inquiry was directed as to the title, at what time the abstract was delivered, and whether it was sufficient: but the Court would not decide upon any matter of relief. *Ibid.*

9. Purchaser decreed to take a title under an obscure will amounting to a power to sell: the legal estate not being given descends to the heir till execution of the power; and then passes to the vendee. *Warneford v. Thompson*, Vol. III. 513.

10. A purchaser under a bankruptcy must take such title as the bankrupt had, and cannot insist upon a title strictly free from objection, as in other cases. In such a case the purchaser objecting to

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the title, but insisting on his purchase, his bill for a specific performance was under the circumstances dismissed with costs, except as to some part of the answer and the depositions containing irrelevant matter. *Pope v. Simpson*, Vol. V. 145.

11. Upon a late decision of the Court of Exchequer, that a presumption from non-payment of tithes cannot bar even a lay impropiator, the Lord Chancellor, though holding the contrary opinion, would not compel a purchaser to take such a title; and dismissed the bill against him for a specific performance. *Rose v. Calland*, Vol. V. 186.

12. A purchaser not compelled to take a doubtful title; nor will a case be directed without his consent. The Court also hesitated upon giving sanction to a title founded on the destruction of contingent remainders by the tenant for life; there being no trustees to support them. *Roake v. Kidd*, Vol. V. 647.

13. A purchaser, who cannot have the original title deeds, the estate being sold in a great number of lots, is entitled to attested copies at the expense of the vendor, notwithstanding the inconvenience and expense. *Dare v. Tucker*, Vol. VI. 460.

14. The Court will not discharge a purchaser and substitute another, even upon paying in the money, without an affidavit that there is no under bargain. *Rigby v. Macnamara*, Vol. VI. 515.

15. One purchaser not substituted for another without affidavit that there is no underhand bargain. *Vale v. Davenport*, Vol. VI. 615.

16. General rule, that the Court will not decide upon a title without a reference to the Master; unless unequivocally, and without fraud or

surprise, waived; a plaintiff seeking a specific performance of a contract being entitled to the opportunity of making out a better title before the Master; and the defendant having a right to farther inquiry beyond the objections arising on the abstract, upon the principle, that the bill seeks relief beyond the law. *Jenkins v. Hiles*, Vol. vi. 646.

17. Charge or direction by deed or will for payment of debts generally, followed by specific dispositions: the purchaser is not bound to see to the application. *Ibid.* 654.

18. From the execution of the contract the estate is in equity the property of the vendee, descendible and devisable, as such. *Seton v. Slade*, Vol. vii. 274.

19. To excuse a purchaser from paying interest during the delay in clearing difficulties as to the title, it is not sufficient, that the money was appropriated and unproductive: but the vendor must have notice of that. *Powell v. Martyr*, Vol. viii. 146.

20. Whether the rule, that, where there is a general charge of debts, not scheduled, a purchaser is not to see to the application, holds, where the purchase is not from the original trustees, but from others, to whom they conveyed, *Quere*. An objection upon that distinction was overruled upon circumstances. *Lord Braybroke v. Inskip*, Vol. viii. 417.

21. Objection by a purchaser upon illegitimacy, upon the circumstance, that the register of marriage could not be found, an inaccurate statement in a deed, and some particularity of description of the child in a will. Upon the time of the marriage, previous to the marriage act, and other circumstances, the Lord Chancellor's opinion was against the objection: but it was overruled upon a general release;

which, though only reciting generally, that objections were taken, was held sufficient; as binding the party to inquire into the nature of the objections. *Ibid.*

22. The rule, that a purchaser shall have possession as from the quarter-day preceding the sale, does not apply to a colliery; which is an article of trade, the profits accruing daily. The proper period is the month or week, in which the purchase takes place; according to the usual course of taking the account. *Wren v. Kirton*, Vol. viii. 502.

23. The Court gives no assistance against a purchaser for valuable consideration without notice; a bill, therefore, of tenant in tail for discovery of title deeds; plea, that a mortgage was executed by tenant for life, alleging himself to be seised in fee and in actual possession of the premises and title deeds as apparent owner, allowed. *Wallwyn v. Lee*, Vol. ix. 24.

24. In plea of purchase for valuable consideration without notice, seeking to shut out discovery, it must be averred, that the vendor or mortgagor was the owner, or pretended owner, and that he was in possession, but it is not necessary to aver that the purchaser was put in possession. *Ibid.* 32.

Principle of this plea. *Ibid.* 33.

25. Receipt for deposit of part of purchase money allowed to be stamped as an agreement during the hearing. *Quere*, however, if it could have the effect of an agreement within the statute, not in itself containing nor referring to any other paper stating the terms of such agreement. *Coles v. Trecothick*, Vol. ix. 234.

26. *Quere*, Also, if payment of such deposit be an act of part performance as to take the case out of the statute? *Ibid.*

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27. *Quere*, As to the effect of inserting the name in the body of an agreement as a signature within the statute. *Ibid.* 253.

28. In the case of heirs expectant the whole duty of making good the bargain is upon the vendee. *Ibid.* 246.

Unless the inadequacy of price amounts in itself to conclusive evidence of fraud, it is not of itself a sufficient ground for refusing a specific performance. *Ibid.*

29. A contract to sell an estate for a life annuity, if signed the Court must execute it, though the party die before the end of the first half-year. *Ibid.*

30. A purchaser under a decree is not affected by any irregularity in the decree or default of the parties acting under it. *Curtis v. Price*, Vol. xii. 104.

31. Upon the sale of an annuity and report of the Master confirmed, the Court directed that the purchaser should pay interest from the very day upon which he could have confirmed the report. *Twigg v. Fifield*, Vol. xiii. 517.

32. Upon a bill for delivering up a contract on the ground of a defective title in the vendor, and for compensation, held that the former part was the only equitable relief he could obtain, the latter was more proper for an action. *Gwillim v. Stone*, Vol. xiv. 128.

33. The representation of a small fine on renewal, and that the estate was nearly equal to freehold, connected with circumstances, may be fraudulent, and grounds for rescinding the contract; but such representations ought to put the party upon inquiry. *Fenton v. Browne*, Vol. xiv. 144.

34. Where the vendor resisted the payment into Court of deposit in the agent's hands, the agent fail-

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ing, vendor's representatives charged with the loss. *Ibid.*

35. Vendor insisting upon the performance, after considerable delay, the contract performed according to the terms, and purchaser therefore entitled to the rents from the time stipulated by the contract. *Ibid.* 150.

36. If a party has notice that the estate is in lease, he has notice of every thing contained in the leases. Where the sale was by a particular, describing a lease as subject to a notice to quit, held that it was not inconsistent with a covenant that the tenant should hold over for a certain time, after the end of the term, distinguished by the context from the "other sooner determination." *Semble*, It is established that time is not of the essence of the contract. *Hall v. Smith*, Vol. xiv. 426.

37. A purchaser may be committed for not obeying an order to pay money. *Lansdown v. Elderton*, Vol. xiv. 512.

38. Where the purchaser before the Master was the solicitor in the cause, who had bought in the lots to prevent a sale at an undervalue, there being no higher bidding, the Court refused to discharge him from the purchase. *Nelthorpe v. Pennyman*, Vol. xiv. 517.

39. The Court will not oblige a purchaser to take a title where there has been an act of bankruptcy upon the mere possibility that it may never take effect, the Court having no means of ascertaining whether a commission could not be taken out. *Lowes v. Lush*, Vol. xiv. 547.

40. So where there has been an act of bankruptcy, a docket struck, though no commission taken out, even though part of the purchase money has been paid, and sub-contracts for the sale of part been entered into and agreements to convey

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accordingly. *Franklin v. Lord Brownlow*, Vol. xiv. 550.

41. Purchaser of small lots entitled to attested copies of the title deeds, accompanying the principal purchase, at the vendor's expense, no stipulation having been made upon the subject. *Boughton v. Jewell*, Vol. xv. 176.

42. Under a general agreement to sell a fee-simple estate, free from incumbrances, the purchaser is entitled to various covenants, according to the nature of the vendor's title. *Church v. Brown*, Vol. xv. 263.

43. Purchaser having taken possession, but objecting to the title, required either to pay in the purchase money, or deliver up possession. *Clarke v. Wilson*, Vol. xv. 317.

44. Objection to title by a purchaser under a trust to sell, as bound to see to the application of the money in satisfaction of scheduled creditors, and others, coming in within a limited time after the date of the deed, or disabilities removed, overruled upon the tenor of the deed; implying, that the receipt of the trustees should be a discharge. *Balfour v. Welland*, Vol. xvi. 151.

45. The doctrine as to binding a purchaser to see to the application of the money by trustees has been extended farther than any sound equitable principle will warrant. *Ibid.* 156.

46. Purchaser not compelled to take a doubtful title. *Stapylton v. Scott*, Vol. xvi. 272.

47. No objection to a purchaser, that the defect of the title appeared on the abstract delivered before he filed his bill. *Ibid.*

48. Reservation of salt works, mines, &c. in 1704, with a right of entry, though no instance of any claim; and the title had been trans-

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ferred in 1761, without such reservation, upon the usual covenants, held an objection, giving a right to compensation: the purchaser not insisting upon it farther. *Seaman v. Vawdrey*, Vol. xvi. 390.

49. Purchaser bound by notice of a judgment, though not docketed. *Davis v. the Earl of Strathmore*, Vol. xvi. 419.

50. Purchaser within the registry act (7 Anne, c. 20.) bound by notice of a deed, not registered. *Ibid.* 427.

51. Purchaser not compelled to take a doubtful title, viz. by executing a power of sale introduced under a direction by a decree establishing a will, to the Master to approve a proper settlement; the will not authorising the insertion of such a power, nor could it be sustained under a power by a former settlement, which, if not extinct by the failure of the limitations, and the union of the estate for life, with the reversion, could not be duly applied to purposes clearly foreign to its original object; and though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes for which powers are created, it could never be intended to refer to a perfectly new set of limitations in a new settlement at a long subsequent period, under a disposition by the will of the owner of the fee; to be exercised not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement, and enable those whom he had made only tenants for life to dispose of the estate. *Wheate v. Hall*, Vol. xvii. 80.

52. No instance of purchase for valuable consideration, without notice, without an averment that the party purchased from a person seised, or pretending to be seised,

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in fee. *Attorney-General v. Backhouse*, Vol. xvii. 290.

53. Purchaser of a lease, though not considered a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, is not to take notice of all the circumstances under which it is derived. *Ibid.*

54. Therefore understood to have notice that the lessors were trustees for a charity; not that the lease was bad, that depending on circumstances *dehors*. *Ibid.* 298.

55. Order on a purchaser, before conveyance, to pay into Court instalments due, and interest according to the contract, the subject being a coal-mine; and the purchaser in possession and working it. *Buck v. Lodge*, Vol. xviii. 450.

56. Purchaser under a particular, giving a false description, not bound at law or in equity, nor by any act of his agent without a fresh authority or subsequent approbation; a different agreement requiring a fresh authority. *Deverell v. Lord Bolton*, Vol. xviii. 509.

57. After judgment against the purchaser of a leasehold house and furniture, lien of the vendor upon the house and furniture, and proof under a commission of bankruptcy against the purchaser for the deficiency. *Ex parte Lord Seaforth*, Vol. xix. 235.

[C.] REFERENCE TO MASTER.

Upon the purchase of a lease, the only objection being, whether the purchaser had a right to see the title of the lessor, held that the rule for reference to the Master upon the title, after answer, did not apply, it is only where the title is in dispute. *Gompertz v. ———*, Vol. xii. 17.

VESTED INTEREST.

VESTED INTEREST.

And see LEGACY, [K.]

1. By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of the grantor's term, in trust to raise an annuity for the lives of the wife and her mother and the survivor: then reciting, that the remainder of the term might expire in the life of the wife or her children, therefore to make a provision for her and her children, by her then, or any future husband, the trustees should be possessed of the said tolls for the remainder of the term, upon trust to raise after the deaths of the grantor and the mother of the wife 100*l.* annually, to be placed out in the purchase of freehold lands or hereditaments, or leasehold estates, for two or three lives, as often as a competent sum should be raised for that purpose; and until convenient purchases should offer, to be invested in government securities upon trust, in case the wife should survive the term, to pay the rents and profits of such estate or estates so to be purchased, or the interest, produce, and profits, to arise from the money so intended to be placed out, until such purchase should be made, to the wife for life; and after her decease to apply the said rents and profits or interest-money towards the support and maintenance of such child and children of her, as should be living at her death, till the youngest should be twenty-one: and then to be possessed of such estates so to be purchased, or of the money arising from the annuity not placed out in one or more purchase or purchases, to the use of such child and children, in such shares and proportions, payable at twenty-one, as the survivor

VISITOR.

of the husband and wife should by will or deed direct, limit, and appoint; in default thereof to the use of all such children, equally to be divided at their respective ages of twenty-one: but if she should die without leaving any child or children, or all should die under twenty-one, then to the use of the grantor, his heirs, executors, administrators, and assigns; and after paying the said annuities, to be possessed of all the surplus money arising from the said tolls during the remainder of the term, for the use of the grantor, his executors, &c. From the death of the grantor, who survived the wife's mother, the trustees received 100*l.* a year; and laid out in stock the sums received and the produce. Issue, only one son, he attained twenty-one in the life of his mother, and survived her. The Court would not invest the fund in land, but held it with the accumulations from the death of the grantor and the future payments a vested interest in the son at twenty-one, and as personal estate belonging to his administrator. *Swan v. Fannerman*, Vol. III. 41.

2. Charge upon land payable at a future day not vested till the time of payment. *Phipps v. Lord Mulgrave*, Vol. III. 613.

3. Remainder subject to appointment is vested, liable to be divested. *Cave v. Holford*, Vol. III. 661.

4. The year allowed to executors is for convenience, and does not prevent the property vesting. *Garthshore v. Chalie*, Vol. X. 13.

VISITOR.

Petition to the Chancellor; as visitor of Trinity Hall, Cambridge, there being no heir of the founder, to declare the election of a fellow void, and to order the petitioner to

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be admitted; the court of King's Bench having in a similar case declined jurisdiction: Lord Chancellor heard the petition, and upon the construction of the statutes dismissed it. *Ex parte Wrangham*, Vol. II. 609.

VOLUNTARY SETTLEMENTS.

And see LUNACY, 3.

1. Bill to have a voluntary deed delivered up, dismissed; cross bill to execute it retained for a year, with liberty to sue upon a covenant in the deed. *Colman v. Sorrel*, Vol. I. 50.

2. Clause in a deed of assignment of stock from a married man to a married woman, that she shall live where he resides; though suspicious, is not sufficient ground to hold it *pro turpi causa*.

Want of allegation shall not prevent the Court from looking into the consideration. *Ibid.*

3. Court of equity does not interfere for volunteers. *Graham v. Graham*, Vol. I. 275.

4. Settlement, after marriage, of stock standing in the name of the wife, the husband being insolvent, and soon after a bankrupt, set aside upon bill by the assignees, after the death of the husband; the stock did not survive, but was decreed to the assignees, subject to a provision for the widow. *Pringle v. Hodgson*, Vol. III. 617.

5. A. assigned by voluntary deed all the personal estate he then had, or at any time might, &c. upon trust to pay the interest, &c. to himself for life, and after to such persons as he should appoint by will for their lives, and subject thereto to pay the principal to his next of kin living at his decease, his or their executors, &c. Soon afterwards he by his will gave some legacies, and

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the residue to the persons by name who were his next of kin at the execution of the deed and at his death, upon whose bill, claiming under the deed an account, &c. and to set aside the legacies; it was held that the power was not executed by the will, but one of the plaintiffs being clearly affected with notice and acquiescence in the plan of giving the legacies instead of executing the power; the cause was ordered to stand over, with liberty to file a bill to establish the legacies, the Court inclining, in case the other plaintiff could be affected with notice, at all events, to apply the interest of the personal estate during the lives of the legatees in payment of the legacies. They were afterwards paid under a compromise. *Griffin v. Nanson*, Vol. iv. 344.

6. A voluntary bond given by a bankrupt to a woman with whom he had contracted marriage, having a wife living at the time, as a compensation for the injury, held void as against creditors; but a bond given for arrears due thereon, held given for a valuable consideration, so as to sustain the assignment of a lease given as a security. *Gilham v. Locke*, Vol. ix. 613.

7. A voluntary settlement is void only as against creditors, and only to the extent in which it may be necessary to deal with the estate for their satisfaction; to every other purpose it is good. *Curtis v. Price*, Vol. xii. 103.

So the husband must be proved to have been indebted at the time, and to the extent of insolvency. *Lush v. Wilkinson*, Vol. v. 384.

And see CONSIDERATION.

8. Voluntary settlement void, under the statute 27 Eliz. c. 4. against a subsequent purchaser for valuable consideration with notice, though a fair provision for a wife and children, an injunction restraining the

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husband from selling was refused; but a demurrer by the husband overruled, as covering too much; the plaintiff being entitled until a sale to an execution of the trust. *Pulvertoft v. Pulvertoft*, Vol. xviii. 84.

9. Limitation to brothers, or other relations within the consideration of a settlement, and therefore not voluntary. *Ibid.* 90.

10. Purchase money cannot be laid hold of in favour of claims under a previous settlement, void under the statute 27 Eliz. c. 4. as being voluntary. *Ibid.* 91.

11. Articles executed against a voluntary settlement. *Ibid.* 92.

12. Voluntary settlement good between the parties. *Ibid.*

13. Court of equity will not act in favour of a mere voluntary settlement; and therefore upon a subsequent purchase, with notice and covenant to lay out the money to the same uses, will not lay hold of the money. *Ibid.* 93.

14. Distinction upon the want of consideration. Upon a contract merely voluntary, this Court will do nothing; but takes jurisdiction upon a trust actually created, unless perhaps against a party, having a right to put an end to it by his own act, under a sole power of revocation, by analogy to the distinction between the cases, where an intail can be barred by fine, and where a recovery is necessary. *Ibid.* 99.

15. The distinction between contract and trust, with reference to the want of consideration, has been acted upon under the same instrument. *Ibid.*

16. Voluntary settlement, though free from actual fraud, and meritorious, as a provision for relations, void against a subsequent purchaser for valuable consideration with notice, whether by conveyance or articles, specific performance decreed

in the latter case. *Buckle v. Mitchell*, Vol. xviii. 100.

17. Notice of the contents of a voluntary settlement has no effect even in equity; therefore notice of a covenant in a voluntary settlement, that the purchase money should be paid to trustees, to be laid out in other lands, to be settled to the same uses, held immaterial. *Ibid.* 112.

18. No equity under a voluntary settlement to prevent a sale. *Ibid.*

19. Distinction between a voluntary contract and a trust created without consideration; in the latter case the Court acts, not in the former. *Pye, ex parte*, Vol. xviii. 149.

20. Distinction between a voluntary deed, which must have its legal effect, and a marriage settlement, or will; in which upon the contract and clear intention the legal effect is controlled. *Sidney v. Shelley*, Vol. xix. 366.

WAIVER.

See RELEASE, 3.

1. Right to tender waived by the party's declaration, that he will not accept it. *Wallis v. Glynn*, Vol. xix. 381.

2. Party may waive an inquiry, directed for his benefit. *Willan v. Willan*, Vol. xix. 594.

WARD OF COURT.

1. Husband committed for marrying a ward of court, and discharged under particular circumstances on undertaking to make a settlement, was held to that, and not permitted upon a consent to receive her whole fortune, viz. a rent-charge for life. *Stackpole v. Beaumont*, Vol. xii. 89.

2. Upon a proposal for a settlement under a commitment for marrying a ward of the Court, a power was directed to be inserted, enabling the wife to settle the interest of a moiety of her fortune upon any future husband for life. The husband, on undertaking by his counsel to execute the settlement, was discharged. *Winch v. James*, Vol. iv. 386.

3. Upon a marriage with a ward of the Court under gross circumstances, a proposal for a settlement of the wife's fortune, giving the husband in the event of his surviving her a life interest, was rejected; and the Court refused even to pay out of the accumulation his debts, chiefly contracted in the maintenance of his wife and children. *Chassaing v. Parsonage*, Vol. v. 15.

4. Upon the marriage of a ward of the Court under flagrant circumstances, the clergyman and clerk were ordered to attend: the husband was committed; and the Lord Chancellor directed the proceedings to be laid before the Attorney-General; expressing his opinion, that contriving a marriage without a due publication of banns is a conspiracy at common law. *Priestly v. Lamb*, Vol. vi. 421.

5. In the case of a ward of the Court a marriage in fact is sufficient to ground the contempt. *Salles v. Savignon*, Vol. vi. 572.

6. Upon the marriage of a ward of the Court, both parties being foreigners, and the property abroad, and the marriage in Scotland on the day the bill was filed, the Court took jurisdiction; but did not commit the husband; ordering him to attend from time to time, and to be at liberty to make a proposal. *Ibid.*

7. Upon a marriage of a ward of the Court, under flagrant circum-

stances, the husband obtaining a licence upon a false oath, that she was of age, the clergyman was ordered to attend, and reprimanded: the husband was committed, and ordered to be indicted. Being convicted and having suffered the punishment, upon his petition to be discharged on executing a settlement, the Lord Chancellor would not approve a proposal giving him any farther interest than, in case of his surviving and no children, under her appointment; requiring the fund to be transferred to the Accountant General: with a trust declared to pay the dividends to her separate use for life, from time to time, and not by way of anticipation: after her decease the capital among all her children by any marriage: if none, and he survives, according to her appointment by will; if no appointment, to her next of kin; and if she survives, subject to her appointment, to her, her executors, &c. No costs to the husband. *Millet v. Rowse*, Vol. VII. 419.

8. Upon the marriage of a female ward of the Court all parties concerned were ordered to attend; and the husband was committed, and restrained from receiving her visits; and she consented to quit her residence with a friend of his under an intimation from the Court, that she would otherwise be compelled to do so. The husband after some time was permitted to propose a settlement. The Lord Chancellor would not admit a provision for children by a subsequent marriage, by way of absolute settlement, but only by a power to the wife to charge by way of appointment to each child a share not exceeding the share of each child by the first marriage. The husband to have some part of the income independent during coverture. The wife having by the pro-

posed settlement a power of appointment in case of no children and the husband surviving, the limitation in default of appointment was directed to be to her next of kin, exclusive of the husband. The Master finding, that the marriage was invalid, a marriage by banns was directed. The Lord Chancellor refused to discharge the husband on undertaking to execute the settlement. *Bathurst v. Murray*, Vol. VIII. 74.

9. Orders have been made for committing to close confinement for marrying a ward of the Court. *Ibid.* Vol. VIII. 79.

10. Under a settlement on marriage of a female ward of Court, the husband having, in consideration of receiving a part of her fortune, the value of which was taken by estimation, released all right and interest in the residue, was thereby deprived of all farther interest, and not permitted therefore on suggestion that the estimation was not fair to attend the account directed against the executors. *Pearce v. Crutchley*, Vol. XVI. 48.

11. Settlement on marriage of a female ward of the Court disapproved, as not sufficiently providing for the event of a second husband, and children of a second marriage. *Halsey v. Halsey*, Vol. IX. 471.

12. Commitment for eloping with a ward of Court, and against another person assisting. Ignorance that she was a ward of Court not admitted as an excuse. *Nicholson v. Squire*, Vol. XVI. 259.

13. Abortive endeavour to marry a ward of the Court a contempt. *Warter v. Yorke*, Vol. XIX. 451.

14. Parties concerned in the marriage of a male infant ward of the Court, attending by order, the clergyman, appearing exculpated, was discharged, with costs out of pocket from the infant's estate. The others

ordered to attend the Master on an inquiry, whether the marriage, by false names, was valid; and upon the report a suit for nullity of marriage at the expense of the infant's estate was ordered; and all the parties were restrained by injunction from all intercourse, personal, by correspondence, or otherwise, with the infant. *Ibid.*

And see PARENT AND CHILD, 5.

WASTE.

And see INJUNCTION, *passim*.—

PARTNERS, 37.—TENANT FOR LIFE, 1. 5. 13.—TRESPASS, 1.

1. A. Tenant for life, remainder to his sons in tail male; remainder to B. for life, and to her sons in like manner, with trustees to preserve contingent remainders: A. being also seized of the reversion in fee, cut and sold timber before the birth of a tenant in tail: afterwards B. had a son, who died soon after his birth, and another son who survived A. The produce of the timber decreed to be laid out in the funds during the life of A. and upon his death without having had a son, to be laid out in land to be settled to the uses of the estate upon which it was so cut. *Powlett v. Duchess of Bolton*, Vol. III. 374.

2. Injunction restraining tenant for life, without impeachment of waste, from cutting timber growing for ornament or shelter, extended to clumps of firs on a common two miles from the house, having been planted for ornament. *Marquis of Downshire v. Lady Sandys*, Vol. VI. 107.

3. The power of tenant for life, under the general words, "without impeachment of waste," not enlarged by implication from more extensive powers given to trustees

for special purposes after her death. *Ibid.*

4. Difference between the powers of tenant for life without impeachment of waste, and trustees under the same words; the latter are bound to a provident execution of their powers. *Ibid.* 115.

5. Injunction against ploughing up pasture, upon a covenant to manage in a husbandlike manner. *Drury v. Molins*, Vol. VI. 328.

6. Injunction to restrain tenant for life without impeachment of waste, from cutting timber or other trees planted or growing for shelter or ornament, and from cutting, except in a husbandlike manner. *Lord Tamworth v. Lord Ferrers*, Vol. VI. 419.

7. Injunction against waste in favour of tenant for life, particularly as to ornamental timber; not so much upon his interest as his enjoyment. *Davies v. Leo*, Vol. VI. 787.

8. A writ at common law after action to restrain waste. *Smith v. Collyer*, Vol. VIII. 90.

9. In waste, the account goes merely upon the injunction. *Grierson v. Eyre*, Vol. IX. 346.

10. In waste it is not sufficient to state information or belief that defendant intends to commit waste, but acts or threats must be proved. *Hannay v. McEntire*, Vol. XI. 54.

11. Injunction against cutting timber in the case of trespass, viz. by a person having got possession under articles to purchase. Distinction between waste and trespass, or destruction, where there is no privity. *Crockford v. Alexander*, Vol. XV. 138.

Writ of estrepement to prevent repetition of waste. *Ibid.* 139.

12. Settlement on marriage, of lands of the husband, to the use of husband for life without impeachment of waste: remainder to trus-

tee to preserve contingent remainders; remainder to the wife for life for jointure, and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the daughters in like manner; remainder to the heirs of the body of the husband and wife. The husband being dead without issue, as to the right of the widow to cut timber, and, which would be a consequence, to the property in it when severed, as tenant in tail after possibility of issue extinct, either in possession, by the effect of merger, if the estates can unite, or if not, in remainder, *Quære*.

A case directed. *Williams v. Williams*, Vol. xv. 419.

13. Tenant for life without impeachment of waste, being punishable, has also the property in the trees severed. *Ibid.* 425.

14. Tenant in tail after possibility of issue extinct, being punishable for waste by the law, has, equally with tenant for life without impeachment of waste by settlement, an interest and property in the timber. *Ibid.* 427.

15. Tenant in tail after possibility of issue extinct, having been once tenant in tail in possession with the other donee, and therefore punishable for waste, may not only commit waste, but also convert to her own use the property wasted. Therefore not to be restrained in equity, except for malicious waste. *Ibid.* 430.

16. Injunction against waste not prevented by appearance the day before the motion. *Aller v. Jones*, Vol. xv. 605.

17. Injunction against waste between tenants in common, on the ground, that one was occupying tenant to the other; otherwise not, except as to destruction. *Twort v. Twort*, Vol. xvi. 128.

18. Equitable waste by cutting trees planted for ornament. *Ibid.* 132.

19. Residue bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively without impeachment of waste, with various limitations in strict settlement; all the estates for life being without impeachment of waste, and the ultimate remainder in fee.

The trustees having laid out part of the fund in an estate with a considerable quantity of timber upon it, taking that to be a sound exercise of discretion, the first tenant for life cannot cut the whole.

As to the consequence, whether, if the trustees are not by their character prevented from taking any benefit, the tenant for life may have any and what proportion of the timber, and how the excess is to be disposed of, *Quære*. *Burgess v. Lamb*, Vol. xvi. 174.

20. Equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, to timber merely ornamental, viz. an extensive wood. *Ibid.*

21. Cutting timber, where necessary for the growth of underwood, not waste. *Ibid.* 179.

22. Land devised to be sold, the money to be laid out in other estates, to be settled: the rents and profits until sale to go to the persons entitled to the estates to be purchased. Tenant for life without impeachment of waste cannot cut timber on the estate to be sold. *Ibid.* 180.

23. Right of tenant for life without impeachment of waste to cut timber generally, in a husbandlike manner, independent of the effect upon the beauty of the place, except equitable waste. *Ibid.* 185.

WEST INDIA CONSIGNEE.

24. Equitable waste not to be extended. *Ibid.*

25. Injunction against cutting ornamental timber, upon the principle of equitable waste, extended to trees planted for the purpose of excluding objects from view. *Day v. Merry*, Vol. xvi. 375.

26. Devise in strict settlement, with a clause of forfeiture by cutting any trees. Upon a bill by the infant remainder man in tail, an inquiry was directed, whether any trees in the park not ornamental, or affording shelter to the mansion house, are proper to be felled; and whether it would be for the benefit of all parties interested, that they should be felled and sold; and the money laid out in other estates, to be settled to the same uses. *Delapole v. Delapole*, Vol. xvii. 150.

And see COPYHOLD, 10. 12.

WEST INDIA CONSIGNEE.

See CONSIGNMENT.

1. Court has jurisdiction upon contracts as to land in the West Indies, if the parties are here. *Jackson v. Petrie*, Vol. x. 165.

2. A consignee of a West India estate appointed not regularly, but by permission of the owners, allowed a priority in respect of supplies furnished, upon the nature of the subject requiring them, if not upon the ground of colonial usage in Jamaica, found by the report not to exist. *Scott v. Nesbitt*, Vol. xiv. 438.

3. In the West Indies, where a tenant for life has supplied the estate with necessaries, a lien subsists after his death upon the inheritance. *Ibid.* 442.

WEST INDIA ESTATE.

See MORTGAGE, 17.—RECEIVER, 1.

WILL.

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WILL.

[A.] WHAT — CODICIL — EXECUTION—PROOF—ATTESTATION.

[B.] CONSTRUCTION.

[C.] REVOCATION—CANCELLING.

[D.] WHAT SHALL PASS.

[E.] EVIDENCE TO EXPLAIN.

[A.] WHAT — CODICIL — EXECUTION—PROOF—ATTESTATION.

1. A boy of the age of fourteen competent to make a will of personal estate. *Ex parte Holyland*, Vol. xi. 11.

2. Upon a commission of review, the sentences of the Court of Delegates and of the Prerogative Court, establishing a testamentary paper as the will, were reversed. *Mathews v. Warner*, Vol. v. 23.

3. Deeds testamentary in their nature often required to be proved as such. *Habergham v. Vincent*, Vol. i. 411.

4. An unfinished testamentary paper of no effect; the party having lived eight days afterwards. *Griffin v. Griffin*, Vol. iv. 197.

5. A letter to an attorney containing instructions for drawing a will, established as a will. *Haberfield v. Browning*, Vol. iv. 200.

6. A will, disposing both of real and personal property, with a clause of attestation, but no witnesses, established as to the personal property. *Cobbold v. Baas*, Vol. iv. 200.

7. If a testator, by a paper subsequent to his will, says he, has bequeathed that which he has not bequeathed, that paper may be proved as testamentary; and the property will pass. *Druce v. Denison*, Vol. vi. 397.

8. A will subscribed by three witnesses, before whom the testator declared it to be his will, but did not sign it, such declaration is equivalent to signing it before them,

and such will is good within 5 sect. stat. of frauds; and also a good will of revocation within the sect. 6. *Ellis v. Smith*, Vol. I. 11.

9. A will not executed according to the statute of frauds has no operation; not even to raise an election against a person taking a benefit in the personal estate. *Earl of Ilchester, ex parte*, Vol. VII. 372.

10. Probate not conclusive; not being refused except in a plain case. *Sinclair v. Hone*, Vol. VI. 607.

11. Real estate in Bermuda passes by a will, not duly executed to pass real estate according to the statute. *Sheddon v. Goodrich*, Vol. VIII. 481.

12. In case of personal estate, if it appears upon the will that something more is intended to be done, and the party is not arrested by sickness or death, that is not held a signing of the will. *Coles v. Trecothick*, Vol. IX. 249.

13. "I A. B. do make this my will" equivalent to signature, and if acknowledged before three witnesses, a good execution within the statute of frauds. *Morison v. Turnour*, Vol. XVIII. 183.

14. Codicil considered as part of the will, and intent drawn from the whole. *Hill v. Chapman*, Vol. I. 407.

15. A codicil with three witnesses, though relating only to personal estate, and expressing no intention as to republication of the will, is a republication; and therefore the will containing a general devise, lands purchased in the interval pass. *Pigott v. Waller*, Vol. VII. 98.

16. Since the statute of frauds, annexation of a codicil to a will not admissible evidence of republication, because parol. *Barnes v. Crowe*, Vol. I. 495.

17. Codicil, by its nature, refers to a former will, and becomes part of it. *Ibid.* 497.

18. To republish a will, re-exe-

cution not necessary, nor a particular intent to republish: intent to consider it as of a subsequent date is sufficient; which intent, in case of land, must, since the statute of frauds, appear in writing. *Ibid.*

19. Legacies out of real estate, given by an unattested paper, cannot stand, unless that paper is clearly referred to by a will duly executed, so as to be incorporated with it: in this instance, there being no such clear reference upon the contents of the instrument, the legacies failed; the circumstance, that a paper was found inclosed in the same cover with the will, indorsed as his will, not being sufficient. *Smart v. Prujean*, Vol. VI. 560.

20. Attestation of a devise by a mark good within the statute of frauds. *Addy v. Grix*, Vol. VIII. 504.

21. Acknowledgment by deviser of his hand-writing to one of the witnesses, who did not see him execute, good. *Ibid.*

22. Witness to a will not interested at the execution or death of the testator is competent, though interested at his examination. *Brgrave v. Winder*, Vol. II. 634.

23. A subscribing witness to a will disposing of real estate, being in Jamaica, his evidence was dispensed with. *Lord Carrington v. Payne*, Vol. V. 404.

24. Where, after inquiry made, and nothing could be heard of one of the witnesses, the two others being dead, upon proof of their hand-writing, the Court dispensed with further evidence. *Quare*, If a will thirty years old can be distinguished from a deed, as to the rule that it proves itself? *McKenire v. Fraser*, Vol. IX. 5.

25. Where the third signature was that of a vice-consul in his public character, the question, whether the attestation could be con-

sidered as that of a subscribing witness, was sent to law. *Clarke v. Turton*, Vol. XI. 240.

And see *BARON AND FEME*, [C.] 1.

26. On the trial of an issue, *devisevit vel non*, all the subscribing witnesses must be examined, except in cases of necessity, as death, insanity, or absence abroad, or the heir waives his right. *Bootle v. Blundell*, Vol. XIX. 494.

27. The rule requiring the examination of all the witnesses to a devise not merely technical. *Ibid.* 500.

28. Examination of all the witnesses to a devise not a technical rule: the decision binding the heir's right to repeated ejectments, until so vexatious as to call for injunction. *Ibid.* 502.

29. Witness impeaching his own act, to be received with the most scrupulous jealousy. *Ibid.* 504.

30. General rule in proving a will against the heir, that all the witnesses must be examined; that general rule admitting necessary exceptions, as death, or absence out of the kingdom, and perhaps not applying, where the will is not wholly, but only partially in question. *Ibid.* 505.

31. Proof against the denial of all the witnesses to a will of their attestation. *Ibid.* 507.

32. Implication, that witnesses to a will saw the testator execute, if so situated, that they might have seen him: not where they were in an adjoining room, and could not. *Morrison v. Arnold*, Vol. XIX. 671.

[B.] CONSTRUCTION.

And see *LIMITATION*.

1. Construction of the execution of a will the same in equity as at law. *Ellis v. Smith*, Vol. I. 16.

Witnesses may attest separately; in that case, if testator acknowledges before each, or signs before

one and acknowledges before the rest, it is good; but bad if he signs it before each, because three different executions, and no one good within the statute. *Ibid.*

Will devising lands to an heir at law is void; but if executed according to the statute, is a good will of revocation of a former will. *Ibid.* 17.

2. Will not to be construed by subsequent circumstances. *Moggeridge v. Thackwell*, Vol. I. 475.

3. The Court will not execute a will partially. *Barnes v. Crowe*, Vol. I. 498.

4. Where a testator refers expressly to a paper already written, and describes it sufficiently, it is as if incorporated in the will. *Harbergham v. Vincent*, Vol. II. 228.

5. The Court is bound to give effect to all the will. *Stackpole v. Beaumont*, Vol. III. 105.

6. Codicil to be taken as part of the will. *Ibid.* 110.

7. Testator directed that his wife should have liberty to occupy his house for a year, provided she continues so long in L.: then, by a distinct clause, he directed his executors to pay her a guinea a week during her stay at L. Her residence there beyond the year does not entitle her to a continuation of the weekly payment. *Walker v. Watts*, Vol. III. 132.

8. Construction of a will and several very inaccurate codicils upon a disposition of the personal estate, as to the interest, whether absolute or for life; as to the extent, whether general or specific, and exempt from debts. *Coxe v. Bassett*, Vol. III. 155.

9. A *videlicet* shall be rejected, if repugnant: not if it can be reconciled and made restrictive. *Wilson v. Mount*, Vol. III. 194.

10. The construction of the will being, that the real estate was well

charged in aid of the personal, with legacies, even supposing the charge not general, so as to include future legacies, a legacy may be revoked and given to another person by an unattested codicil. *Attorney-General v. Ward*, Vol. III. 327.

11. Words not to be rejected, unless repugnant to the clear intention manifested by other parts of the will. *Ibid.* 320.

12. A will cannot be varied upon the ground of mistake, unless the alleged mistake be clearly inconsistent with the intention of the whole will: corrected when clear intention appears on the whole will. *Philips v. Chamberlayne*, Vol. IV. 51. *S. P. Mellish v. Mellish*, Vol. IV. 45.

13. Will may be restrained in extent to a partial disposition by a particular enumeration or reference to other deeds, notwithstanding the general words, "personal estate." *Holford v. Wood*, Vol. IV. 76.

14. In some cases, as for creditors, an intention will be inferred from the purpose beyond what is expressed. *Thellusson v. Woodford*, Vol. IV. 311.

15. If words are capable of a twofold construction, the rule is to adopt such as tend to make it good, even in a deed, much more of a will. *Ibid.* 312.

16. A will not affected on account of the unmeritorious object: there is only one general rule of construction in law and equity applicable to all wills, however the Court may condemn the object, the intention is to be collected from the whole will, according to the natural common import of the words: words of art, according to the technical sense, unless plainly not so intended. The Court is bound to carry the will into effect, if consistent with the rules of law, and if they can see a general intention consistent with such rules; but the

particular mode is not, though that shall fail, the general intention shall take effect. *Ibid.* 329.

17. Limitation over upon the death of a person unmarried, and "without issue:" "unmarried," in its usual sense, meaning never having been married, "and" was construed "or," to afford a reasonable construction. *Maberly v. Stode*, Vol. III. 450.

18. Words of survivorship added to a tenancy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent. *Ibid.*

19. Words of survivorship in a will shall not defeat the effect of words importing a tenancy in common, but shall be referred to some time, as the death of the tenant for life; or even to the death of the testator; though a construction not to be adopted, if there can be any other. *Russel v. Long*, Vol. IV. 551.

20. Indorsement upon a note, "I give this note to A.," may be proved as testamentary. *Chaworth v. Beech*, Vol. IV. 565.

21. Favour or disfavour to the intention is not a ground for construing a will. *Innes v. Johnson*, Vol. IV. 574.

22. All codicils are part of the will. Therefore, a codicil merely for a particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil. *Crosbie v. Macdowal*, Vol. IV. 610.

23. Two inconsistent wills: a codicil referring to the first by date, as the last will cancels the intermediate will; and evidence of mistake cannot be admitted. *Ibid.* 616.

23. *Voluntas testatoris ambulatoria est usque ad mortem.* *Mathews v. Warner*, Vol. IV. 210.

24. The rule of construction of wills is, that if the general intention

can be collected, or any one particular object, expressions militating with that may be rejected, if plainly appearing to have been inserted by mistake; not otherwise: and if two parts of the will are totally irreconcilable, the latter overrules the former. *Sims v. Doughty*, Vol. v. 243.

25. Construction of several testamentary papers, that some revoked others, probate having been granted of all. *Beauchamp v. the Earl of Hardwicke*, Vol. v. 280.

26. The Lord Chancellor of opinion, that it is expedient to apply the provisions of the statute of frauds as to devises to wills of personal estate. *Ibid.* 286.

27. Construction of a very inaccurate will, that the words, "and all I am possessed of" were confined to a specific bequest of stock immediately preceding; meaning all interest in that fund; and did not comprise the general residue; which was by a subsequent clause expressly disposed of in a different manner. *Wilde v. Holtzmeier*, Vol. v. 811.

28. The words "all I am possessed of" in a will, in legal construction, relate to the time of the death, not of the execution of the will, unless explained. *Ibid.* 816.

29. Some sense to be given to every part of a will, if consistent with other parts; the legal sense, if possible. *Ibid.* 818.

30. Rules of construction of wills. Every word to have effect, if not inconsistent with the general intention; which is to control: if two parts are totally inconsistent, the latter prevails: if a meaning can be collected, but it is wholly doubtful in what manner it is to take effect, it is void for uncertainty. *Constantine v. Constantine*, Vol. vi. 100.

31. General words controlled, in order to make the whole consistent. *Whitmore v. Trelawny*, Vol. vi. 129.

32. The Court never alters or adds to a will without necessity. *Longmore v. Broome*, Vol. vii. 129.

33. Rule of construction not to make any intendment contrary to the plain and usual sense of the words, unless from other parts of the will plainly appearing, not intended to have that extensive operation. *Earl of Ilchester, ex parte*, Vol. vii. 368.

34. Though the testator might not have contemplated the event, that will not affect the construction. *Ibid.* 369.

35. "And" construed "or" to give effect to all the words. *Bell v. Phym*, Vol. vii. 458.

36. The Court will not take into consideration the amount of the property or the number of objects, for the purpose of construing a will, except in the case of a specific disposition. *Sibley v. Perry*, Vol. vii. 522.

37. Testator having directed a transfer of 3 per cent. consols three months after his decease, gave several other legacies of stock "as aforesaid." Those words upon the whole will referred to the description of the stock, not to the time of the transfer. *Ibid.*

38. Bequest to A. for her and her children's use. A transfer decreed to A. *Robinson v. Tickell*, Vol. viii. 142.

39. Words having an obvious meaning, not to be rejected upon a suspicion, that the testator did not know what he meant. *Milner v. Slater*, Vol. viii. 306.

40. The word "estate" in a will, unless qualified, passes both real and personal estate. *Barnes v. Patch*, Vol. viii. 604.

41. Under a disposition by will to A.'s and B.'s families, the children are entitled, exclusive of their parents, and *per capita*. *Ibid.*

42. Bequest of the testator's fortune in India not extended under the general words "temporal estate" in the introductory part of the will to property in England, part remitted from India between the will and the death, and some in its passage to England at his death. *Sadler v. Turner*, Vol. viii. 617.

43. It is proper to abide by the *primâ facie* intention of the words, unless upon solid and rational grounds, and not slight circumstances or plausible reasonings, it appears not to be the meaning: held therefore that after a legacy of stock in the 4 *per cents.* a legacy to the same persons of "an additional sum, 2000*l.* more, to be paid out of the 4 *per cents.*" was a pecuniary legacy. *Deane v. Test*, Vol. ix. 146.

44. The vesting is not prevented by a provision for survivorship among the legatees, in case of the death of any one under 21. *Ibid.*

45. Provision for survivorship after death of tenant for life, in case of his not leaving issue, confined to issue living at the death of the tenant for life: Court is indisposed to the construction of indefinite survivorship. *Jenour v. Jenour*, Vol. x. 560.

46. Will construed so as to support the intention, though against the strict grammatical construction. *Thellusson v. Woodford*, Vol. xi. 148.

47. Court of equity will mould a directory clause to the purposes of the testator. *Countess of Lincoln v. Duke of Newcastle*, Vol. xii. 234.

So of an executory covenant, where intention is manifest. *Ibid.*

48. Where an intention appeared to dispose of all testator's worldly effects, held that the phrase "what remains to go," &c. gave a general residue, and therefore comprised

personal estate given upon too remote a contingency. *Crooke v. De Vandes*, Vol. xi. 330.

Such residue given to two, held a joint interest. *Ibid.*

49. When words are by their import *primâ facie* equivalent to pass future interests in personal estate, that construction ought to prevail, unless a sound interpretation of the context calls for another construction. *James v. Deane*, Vol. xi. 389.

Executor to a tenant by sufferance or at will, dealing with opportunities, and obtaining a larger interest, is a trustee for the residuary legatee. *Ibid.*

50. In trying the meaning of phrases in a will, you may look at all the circumstances in which the Court might have been called upon to determine the meaning of the same phrases applied to a different state of circumstances. *Earl of Radnor v. Shafto*, Vol. xi. 457.

51. If the meaning of a will be ascertained, reasoning from supposed cases will not induce the Court to make a different construction, but can only lead to a conclusion that the testator did not see all the consequences; but the absurdities, improbabilities, and inconsistencies, which may arise out of cases falling within one construction or another, are attended to, with a view of ascertaining. *Leigh v. Leigh*, Vol. xv. 103.

52. Bequest of leaseholds for years, determinable upon lives, for life, with remainder over, for all the residue of the term and interest the testator shall have to come therein at his decease: the term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death as tenant by the year. Upon the general words, unrestrained, comprising

the interest from year to year, and the intention upon the whole will, a subsequent lease, obtained by the executrix, the widow and tenant for life under the will, was held subject to the uses of the will, as the residue of the term at his death, however short, would have been. *James v. Dean*, Vol. xv. 236.

53. Rule of construction, upon the effect of general words in a will, as applying to rents and profits, undisposed of, reversions, &c. to consider as intended what falls within the usual sense; unless declaration plain to the contrary. *Church v. Mundy*, Vol. xv. 406.

54. The word "effects" in a will equivalent to "property" or "worldly substance." *Bengough v. Walker*, Vol. xv. 507.

55. Express bequest, or power, not controlled by the reason assigned; which, though it may aid the construction of doubtful, cannot warrant the rejection of clear words. *Cole v. Wade*, Vol. xvi. 46.

56. Residuary bequest to A. "in case she should have legitimate children; in failure of which" to go over: A. having only one child born alive, who died before her, entitled absolutely. *Wall v. Tomlinson*, Vol. xvi. 413.

57. Construction of a will: giving to the testator's daughter, by the description of heir under his will, the legacy of a legatee who died during the testator's life, by way of special substitution; not merely by lapse to her as the residuary legatee. *Rose v. Rose*, Vol. xvii. 347.

58. Effect of the word "estate" in a will, as importing the absolute property. *Nichols v. Butcher*, Vol. xviii. 195.

59. Term for 99 years in a will restrained to a life by implication from a subsequent limitation, not

after the end of the term, but after the failure of that life. *Wykham v. Wykham*, Vol. xviii. 421.

60. Of two inconsistent limitations in a will the latter prevails. *Ibid.*

61. Will not to be construed by something *dehors*, as by the state of the property, where no latent ambiguity. *Page v. Leapingwell*, Vol. xviii. 466.

62. Different construction of the word "surplus" from that which it commonly bears, inferred from the expression of the will. *Ibid.*

63. Construction of a will devising specific parts of the estate to certain persons for their lives, the residue after the death of those persons to others, some of whom were the heirs at law, that the words "after the death," &c. meant only subject to the life estates; repelling the implication of an estate for life in the residue, if it could arise; and whether it could, where some of the devisees were not heirs, *Quære. Dyer v. Dyer*, Vol. xix. 612.

64. More scope given to the intention in wills than in deeds. *Sidney v. Shelley*, Vol. xix. 359.

65. Distinction upon effect of testator's declarations of intention, though conformable to what he afterwards does, whether he was or not then capable of conversing on the subject. *Bootle v. Blundell*, Vol. xix. 507.

66. Rules for construction of wills: the intention, if possible, to be collected from the words, not from the circumstances *dehors*; upon general principles and established rules, not by conjecture; and without inquiring, whether the personal estate is sufficient for the debts. *Ibid.* 521.

67. Of two repugnant intentions in a will, the most convenient executed; as where all children are in-

tended to take, and also the first attaining twenty-one to have its share. The latter intention prevails; though necessarily excluding subsequent children. *Deffis v. Goldschmidt*, Vol. XIX. 570.

68. Under a disposition of personal property by words, used in devising real estate, those inapplicable are omitted. *Browncker v. Bagot*, Vol. XIX. 581.

69. Every part of a will contemporaneous by the execution. *Langham v. Sandford*, Vol. XIX. 647.

70. Words transposed to make sense of a will, otherwise insensible, and to make them take some effect rather than be totally void, not where plain and sensible; much less to let in different devisees and legatees. *Chambers v. Brailsford*, Vol. XIX. 653.

71. Natural construction of words in a will adopted, unless there is such an impossibility of so construing the will as to authorise their rejection, or such uncertainty, that no effect can be given to them. *Ibid.* 654.

72. Words in a will not to be rejected, unless they cannot by any possibility have a rational construction. *Ibid.*

73. Effect to be given to a will, if a meaning can be found. *Tibbits v. Tibbits*, Vol. XIX. 664.

[C.] REVOCATION.—CANCELLING.

1. The rules as to revocations of wills are the same in law and equity. *Brydges v. Duke of Chandos*, Vol. II. 417.

2. Articles to settle estates of the husband subject certain uses and trusts on the first and other sons in tail male, remainder to the husband in fee; the husband confirming the articles, devised the same estates in case he should die without issue

male, or on failure of issue male in the life of his wife; and by a subsequent settlement in performance of the articles, conveyed to trustees and their heirs after certain uses and trusts, to the use of the first and other sons in tail male, remainder to himself in fee: the whole fee being conveyed, and some of the purposes being inconsistent with the will and articles, held that the will was revoked as to the settled estates. *Hamilton v. Lloyd*, Vol. II. 427.

3. If lands devised are conveyed for a partial purpose only, as a mortgage, or payment of debts, it is a revocation *pro tanto* only. *Ibid.*

4. The rule that, after purchased, lands do not pass by a devise, does not arise from the word "having" in the statute of wills; but from the difference between the Roman testament, or wills of personal, and a devise by the law of England, which is an appointment of the person to take the specific estate in nature of a conveyance, though fluctuating till death. *Ibid.*

5. Partition is no revocation of a devise; otherwise if the object extends farther, even merely to a power of appointment. *Ibid.* 429.

6. A legal estate, taken after a devise of the equitable, is no revocation. *Ibid.*

7. A recovery suffered after a will, though no intention to revoke, is a revocation. A covenant may be a revocation. *Ibid.* 430.

8. By marriage articles the husband covenanted to convey to the use of himself for life; remainder in trust to secure an annuity to his wife for life in bar of dower; remainder to trustees for years to raise portions; remainder to the sons and daughters successively in tail; remainder to his own right

heirs: afterwards he devised upon condition that he should leave no issue; and after the will he, in pursuance of the articles, conveyed to trustees and their heirs to the uses and trusts of the articles: the will is not revoked. *Williams v. Owens*, Vol. 11. 595.

9. The rules as to revocation applied to legal estates are in equity applied to equitable estates. Mortgage in fee is a total revocation at law, but in equity only *pro tanto*. *Ibid.* 598.

10. Recovery by tenant in tail with reversion in fee is a revocation at law; so in equity, if an equitable estate. *Ibid.* 599.

11. Where a devised estate is differently modified, there is a revocation; otherwise where the testator remains with the same estate and interest, and subject to the same means of disposition, though changed as to the legal or equitable quality. *Ibid.*

12. Conveyance in fee for payment of debts is no revocation. *Ibid.* 600.

13. Fine for the mere purpose of a partition is no revocation even at law. *Ibid.*

14. Articles to sell a devised estate are a revocation in equity, but not at law. *Ibid.* 601.

15. Testator devised all his real estate to his sister for life; remainder to her children as she should appoint; for want of appointment, to all her children and their heirs as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will not then at hand, he gave one of them an annuity: and directing his annuities to be paid out of his 3 *per cent.* stock, he charged them on his real estate in case of a deficiency: and directing the residue of his personal estate to be invested in freehold

lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling or conveying, all his estates and property, which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares, and proportions, as she should approve, with remainder to their respective issue, and cross remainders and the usual powers and clauses in strict settlement. The testator's sister died in his life; and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil. As to the real estate the will is not revoked, but is republished by the codicil; and the two nieces are entitled to the real estates, and to those directed to be purchased, as tenants in common in fee. *Meggison v. Moore*, Vol. 11. 630.

16. Devise by tenant in fee, in case he should die without leaving any issue living at his decease, and subject to such jointure or jointures as he might make upon the woman he might marry: by lease and release previous to the marriage of the devisor, the devised estates were conveyed to trustees and their heirs as to part, subject to certain trusts to the use of the devisor and his heirs till the marriage; and afterwards, subject to other trusts, to the use of him for life; remainder to trustees to preserve, &c.; remainder, subject to farther trusts; to the use of the first and other sons of the marriage in tail male; remainder to the devisor in fee; and as to the other part, to the use of the devisor till the marriage; and afterwards, subject to a jointure to the intended wife, to the use of the devisor in fee: by an article executed previously to the will, in contemplation

of the said marriage, provisions were made as the basis of a settlement of the same nature, but in certain respects different from that, which was executed: the will is revoked as to the whole estate both in law and equity: a settlement having been made previously to the marriage, the articles were laid out of the case; and parol evidence of an intention not to revoke was rejected. *Cave v. Holford*, Vol. III. 650.

17. Revocation of a will by a conveyance never completed. *Ibid.* 653.

18. Lease for years or life is a revocation of a will *pro tanto* only. *Ibid.*

19. Mortgages in fee and conveyances in fee for payment of debts revoke a will *pro tanto* only in equity. *Ibid.* 654.

20. If testator makes a feoffment after the will to the use of himself in fee, or suffers a recovery, it is a revocation. *Ibid.* 664.

21. By a mortgage in fee of a devised estate, or a conveyance in fee for payment of debts, the will is revoked *pro tanto* only. *Earl Temple v. Duchess of Chandos*, Vol. III. 685.

22. Mutual wills by two unmarried sisters under 21: the marriage of one does not revoke the will of the other. *Hinckley v. Simmons*, Vol. IV. 160.

23. *Quere*, Whether by the birth of more children subsequent to the date of the will, and after the death of the testator's wife, his second marriage, but no children by that, the will is revoked? *Gibbons v. Caunt*, Vol. IV. 840.

24. A subsequent marriage and birth of a child revoke a will. *Quere*, As to the propriety of admitting evidence against the presumption. *Ibid.* 848.

25. Devise of real estates to trustees and their heirs, upon trust to convey upon certain trusts; and subject thereto, to several natural sons successively in strict settlement. The testator also gave the residue of his personal estate upon trust to be laid out in land, to be settled to the same uses, &c. A codicil revoking so much of the will as directed the settlement of his said estate upon his sons, and varying the order of the limitations, was considered as confined to that object, operating by way of substitution only, not as a revocation of the devise; and therefore extending to the estates to be purchased with the personal estate. *Lord Carrington v. Payne*, Vol. V. 404.

26. A testator by codicil revoked the legacy of 50*l.* bequeathed to his sister. The only legacy given to her was 100*l.* given by the will: as to the effect of the codicil, *Quere. Ibid.*

27. Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn; a subsequent direction, that none of the devisees shall take or come into possession before the age of 25, was held confined to the actual possession, and not to operate by way of revocation; and therefore upon the death of the first tenant for life under 25 the accumulation belonged to his personal representative. *Montgomerie v. Woodley*, Vol. V. 522.

28. A devise is not revoked by a mortgage in fee to the devisee. *Baxter v. Dyer*, Vol. V. 656.

29. Devise revoked by a contract for sale. *Ibid.* 654.

30. Whether a will was revoked by marriage and the birth of a child under particular circumstances, *Quere. Ibid.* 663.

31. Devise of fee-farm rents revoked in equity as well as at law by a subsequent conveyance to a trustee, operating an alteration of the estate beyond the mere purpose of securing a mortgage: but on account of the laches of the plaintiffs, the heirs at law, the Master of the Rolls would not assist them further than by retaining the bill; with liberty to bring such action or suit as they may be advised; to give an opportunity of taking the opinion of a court of law upon the question, whether there is a revocation at law; or, whether a court of law will presume republication from the long possession, leaving open the question, whether the plaintiffs are entitled to any account, or how far back. *Harmood v. Oglander*, Vol. vi. 199.

32. Wherever the whole legal estate is conveyed, whether for a partial or general purpose, with the single exception of the case of partition, a court of law has nothing to do with the purpose; but is to see, whether the interest remains the same in the devisor as at the date of the will: if not, whether the purpose is partial or general, by way of charge, or not, it is a revocation at law. *Ibid.* 218.

33. The question in a court of law as to the revocation of a will is only, whether the legal devise is revoked by the deed. All other questions as to the partial purpose, &c. are merely equitable questions. The case of a partition is anomalous. *Ibid.* 219.

34. Where the deed, clearly revoking the will at law, is only for the partial purpose of introducing a particular charge or incumbrance, and does not affect the interest of the testator beyond that purpose, it is only a partial revocation in equity; and though, after that purpose is answered, the use is declared for the

testator and his heirs, a court of equity will hold the party a trustee for the devisees; so upon a devise of an equitable estate, and a subsequent conveyance of the legal estate to the devisor and his heirs. *Ibid.*

35. Devise not revoked in equity by a mortgage in fee for payment of debts; though after the debts are paid the devisor takes a conveyance to him and his heirs. *Ibid.* 221.

36. Any alteration of the estate, or a new estate taken, is at law a revocation, whether for a partial or general purpose; to which a court of law cannot advert; neither ought they to take any notice of articles or covenants, charging the estate in equity; but only to say upon the will and the subsequent deed, whether the old estate is changed, and a new estate acquired. *Ibid.* 222.

37. Equity never controls the law upon revocation, except, where the beneficial interest, being distinct from the legal estate, is devised, and the devisor afterwards takes the legal estate without any new modification or alteration: 2dly, Where having the complete legal and beneficial estate at the date of the will he divests himself of the legal estate; but remains owner of the equitable interest; as in the case of a mortgage or conveyance for payment of debts. *Ibid.* 223.

38. Settlement of leasehold estates not revoked by a subsequent assignment by the trustee to the settler, entitled for life or by the will of the latter: no intention to revoke appearing; and the terms of a power of revocation not being complied with. *Ellison v. Ellison*, Vol. vi. 656.

39. A second marriage and the birth of children, the wife and children provided for by settlement, and there being children by the former marriage, a case of exception from

the rule, that marriage and the birth of a child revoke a will. *Ex parte Earl of Ilchester*, Vol. VII. 348.

40. An act inconsistent with the will, though by some accident, independent of the will, it fails of effect, is a revocation; as a covenant to make a feoffment and letter of attorney to make livery; but no livery made. *Ibid.* 370.

41. Parol revocation of will before the statute of frauds. *Ibid.* 371.

42. Previously to the statute of frauds and that as to guardianship any declaration, from which an intention to revoke could be collected was sufficient. *Ibid.*

43. Disposition by will, so as to have legal effect, and afterwards another, by which the former would be revoked, but the other substituted; and it is evident, the testator did not intend revocation for any other purpose than to give it effect: if the second instrument cannot have the effect of disposition, it shall not be a revocation. *Ibid.* 372.

44. Where the act is valid for the whole purpose, but by disability of the person to take, or some matter *dehors* or subsequent to the will it is ineffectual, it is a revocation. *Ibid.* 373.

45. A will may be revoked by an instrument; not attested as would be required to give it effect. Any disposition, that would by the instrument have completely put an end to that will, shall have that effect, though the instrument becomes ineffectual by any accident or circumstance *dehors* the will. *Ibid.* 374.

46. The rule of the civil law required the same solemnity to annul an instrument, that was necessary to its completion: relaxed by Justinian in certain cases as to the revocation of a will. The rule never adopted in its full extent in this

country. Parol revocation of a will good before the statute of frauds. Parol revocation of agreements. Different solemnities by that statute for the framing and the revocation of wills. *Ibid.* 376, 377.

47. Ground of the cases of feoffment without livery and bargain and sale without enrolment as to the revocation of a will. *Ibid.* 378.

48. A perfect and complete will, inconsistent with the former, is a revocation, though the devisee may never derive benefit from it: otherwise, if defectively executed and incapable as a will. *Ibid.* 379.

49. An express revocation, if only subservient to another purpose, for which it is incompetent, shall not revoke. *Ibid.*

50. Rule of the civil law: "*Tempus prius testamentum rumpitur, cum posterius perfectum est.*" *Ibid.* 380.

51. The effect of revocation in equity produced by an agreement for partition, in such a manner as to deprive the testatrix in equity of any interest in the estate devised; and the devisee disappointed has no right to compensation from the heir. The agreement good to this effect, though it cannot be precisely executed; admitting compensation: Whether, if abandoned, the will is set up again, *Quere.* *Knollys v. Alcock*, Vol. VII. 558.

52. Mere partition, whether by compulsion or agreement, is not a revocation of a will: but the slightest addition, as a power of appointment prior to the limitation of the uses, is sufficient. *Ibid.* 564.

53. Codicil reciting a specific and limited purpose revokes the whole devise, declaring the trusts again, with the proposed alteration, and confirms the will in every particular not thereby altered or revoked. The omission of one trust, though probably against the intention, cannot

be supplied. *Holder v. Howell*, Vol. VIII. 97.

54. Upon an appeal from the decree at the Rolls, the Lord Chancellor was of opinion, that the devise was revoked in equity as well as at law; and that the fee-farm rents, by the effect of the revocation descending to the heir, were not applicable to the debts before the other real estates devised, with the exception of a part, upon a special trust for that purpose by sale; but, that the decree deciding that the parties ought to go to law, ought to have directed the specific proceeding. The title, however, not appearing correctly upon the pleadings, inquiries were directed. *Harmood v. Oglander*, Vol. VIII. 106.

55. No instance of a revocation of a will at law being held not a revocation in equity, where the partial, particular purpose was not for charges or incumbrances, or to pay debts. *Ibid.* 126.

56. Revocation of a devise by an exchange; though the land after the death of the deviser was restored to his heir, under an arrangement in consequence of a defect discovered in the title of the other party to the exchange. *Attorney General v. Vigor*, Vol. VIII. 256.

57. The ground, upon which a partition does not revoke a devise. If the object is to do any thing beyond mere partition, it is a revocation. *Ibid.* 281.

58. Disseisin and remitter by entry no revocation. Vol. VIII. 282.

59. Devise of estate for life with a power to dispose by will, does not pass the absolute interest. *Reid v. Shergold*, Vol. x. 370.

60. Where tenant for life, with power to dispose by will, obtained the legal estate and executed the power by will, but afterwards sold

her interest in consideration of an annuity, and surrendered to the use of the purchaser; held, that such surrender was a revocation of the will, and that not being an execution of the power within the intent, the purchaser became only a trustee for the person who would have taken if such will had never been made. *Ibid.*

61. The Court has no authority to declare what is and what is not a man's will. *Pemberton v. Pemberton*, Vol. XIII. 297.

Where both the instruments duplicates of a will were with the testator, and he cancelled only one, having previously altered it; presumption is weaker that he intended to cancel both. *Ibid.* 310.

62. Residuary bequest cancelled by striking through with a pencil all the disposing part, leaving only the general description, with notes in pencil in the margin, indicating alteration, and a different disposition of certain articles; a resulting trust for the next of kin. *Mence v. Mence*, Vol. XVIII. 348.

63. A devise of real estate is not revoked by bankruptcy: the bankrupt laws take the property out of the bankrupt only for the purpose of paying his creditors, and they being satisfied, the assignees are mere trustees for him, and may be called upon to convey to him. *Charman v. Charman*, Vol. XIV. 580.

64. A residuary bequest in general terms.

Revocation by a codicil as to "plate, linen, household goods, and other effects (money excepted)."

The exception prevents the restrained construction, in general, of the words "other effects:" viz. *ejusdem generis*: stock therefore, which does not pass under the word "money," was included, with leasehold

and all personal, except money and bank notes. *Hotham v. Sutton*, Vol. xv. 319.

65. Devise revoked by a conveyance of trustees and their heirs to secure a jointure, and, subject to a term for that purpose, to the devisor, and his heirs, with a covenant to surrender copyhold estates to the same uses. *Vawser v. Jeffrey*, Vol. xvi. 519.

66. Mortgage in fee after a devise, a revocation *pro tanto* only. *Tucker v. Thurstan*, Vol. xvii. 134.

67. Revocation of devise by a contract for sale, though rescinded after the devisor's death. *Bennett v. Earl of Tankerville*, Vol. xix. 170.

68. A binding and valid contract for the sale of lands devised is in equity as much a revocation as a conveyance would be at law. *Ibid.* 178.

69. Whether the abandonment of a contract for sale of devised estates in the devisor's life would set up the will again without republication, *Quære. Ibid.* 179.

70. Trust by will to permit testator's wife to receive interest and rents for life, for the maintenance of herself and children, and in case of her marriage that the interest, &c. shall not be paid to her any longer, but be applied by his executors and trustees (she being an executrix with them) for maintenance of the children, revoked on her marriage; and not restored by a general residuary disposition to her. *Duncan v. Duncan*, Vol. xix. 396.

[D.] WHAT SHALL PASS.

1. Bequest to wife of lease of testator's house, furniture, &c. then for life interest of all his monies, then half of debts due to him at the time of his death (one excepted, of which the debtor to pay her the in-

terest), to be disposed of as she thought fit; in case interest of monies insufficient for her maintenance, executors to allow part of the principal out of debts (except the one excepted); after her death interest of all monies remaining to his sister, after her death all sums remaining to her daughter for ever; if they die before his wife, one half of all sums remaining to be disposed of as his wife should think fit, other half to A. Upon bill by testator's niece against executors of the wife, niece held entitled to all beyond the debts, and a moiety of all debts, except the one excepted, the other moiety to wife's executors, who being also executors of testator, were decreed to take out of wife's share a sum advanced under their power. *Collet v. Lawrence*, Vol. i. 268.

2. Testatrix directed all her estate to be turned into cash; if amounting to 20,000*l.* to go thus; if less, in similar proportions; then subject to some legacies, debts, &c. the *residue* of her estate in sixteenths, two to her mother for life, the rest to different persons absolutely; she then made three residuary legatees: the shares given are only of the 20,000*l.* subject to the charges; all beyond goes to the residuary legatees. *Green v. Scott*, Vol. i. 282.

3. Plate excepted from bequest of personal to wife, after her decease over, and recited to be hereinafter given to daughter, but not farther noticed, held undisposed of. *Fredrick v. Hall*, Vol. i. 396.

4. Devise of freehold and copyhold, surrendered to the use of the will, to trustees and the survivor and his heirs, in trust to pay debts and legacies, an annuity to the testator's son, and for other purposes; then on the marriage or attaining twenty-one of his grand-daughter, to con-

vey to her for life; remainder to trustees, &c. remainder to her first and other sons in tail male; remainder to her daughters in tail general; remainder to such persons, for such estates, and subject to such charges and conditions, as he should by any deed or instrument, with two or more witnesses, appoint. The next day by deed poll with two witnesses reciting his will, and that he had reserved a power of disposing of his estate farther, he directed his trustees immediately after the death of his grand-daughter and failure of her issue to convey all his real to the first and other sons of his son in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs and assigns for ever. No conveyance was made. The grand-daughter died without issue: then the son died without issue, leaving one trustee surviving. Under the will alone the trustees have a mere legal estate; and all the equitable interest beyond the express dispositions would result to the son as heir: but the deed was considered as a codicil sufficiently executed to pass copyhold, but not freehold. The last limitation is a contingent remainder to the heir of the surviving trustee; and a conveyance was directed, with an insertion of trustees to support that remainder as to the copyhold; the rents and profits of the copyhold during the life of the trustee, and all the freehold, to go to the heir of the testator. *Habergham v. Vincent*, Vol. II. 204.

5. A rent is a tenement, and therefore cannot pass by will without three witnesses, if out of freehold; the word "tenement" being in the statute of frauds. *Ibid.* 232.

5. A deed and a will cannot unite. *Ibid.* 235.

6. Testator devised all his manors,

messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, "except what is hereinafter mentioned and devised," to the use of all his children successively in strict settlement; and gave two of them annuities, which he charged upon a rectory held by him under a lease for lives, which he directed to be renewed, if those two children or either should be living at his death, and that their lives or that of the survivor should be inserted in the new lease, and the fine paid out of his personal. He gave part of his personal specifically, and directed the residue to be laid out in land to be settled to the same uses as his real: but afterwards by a testamentary paper unattested he disposed of his personal otherwise: the heir contracted to sell the lease of the rectory; and upon a case directed to the court of King's Bench on his bill for specific performance, the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant: but the Lord Chancellor considered that title too doubtful to be forced on a purchaser. *Sheffield v. Lord Mulgrave*, Vol. II. 526.

7. Three annuities for a term of years bequeathed in trust for three children, *A. B.* and *C.* respectively for life; in case of the death of either, leaving any child or children, his or her annuity to be equally divided between such child or children share and share alike; in case of the death of either without issue, his or her annuity to go to the survivors or survivor of them equally share and share alike; with a limitation over in case of the deaths of all without issue as aforesaid: *A.* died without issue; *A.*'s annuity went to *B.* and *C.* subject to the contingent limitation over, and upon *B.*'s death leaving children, belongs in moieties

absolutely to his administrator and C. *Vandergucht v. Blake*, Vol. II. 531.

8. Testator devised freehold estate to his brother and his wife for their lives; remainder to A. his nephew, and the heirs male of his body; and for default of such issue to B. in the same manner; remainder over: he gave so much of the same estate as was leasehold, to his brother and his wife for so many years of the term as they or the survivor should live, and directed, that after the decease of the survivor the leasehold premises should from time to time be held and enjoyed and belong to the several persons in succession, who should for the time being be entitled to the freehold, so far as the rules of law would admit, and gave the same direction as to the furniture of the mansion-house. By codicil reciting, that he had devised the freehold part after failure of issue male of A. to B. in tail male, &c. he revoked those limitations, and after failure of issue male of A. devised to others, and repeated the disposition he had made of the leasehold and furniture: A. takes the leasehold absolutely. *Fordyce v. Ford*, Vol. II. 536.

9. Devise to the heir at law and his issue male in strict settlement; remainder in trust to be sold, and the money to be distributed among certain persons or the survivors or survivor of them, and that the share of one should previous to her marriage be settled upon her for life, and after her death upon her issue, in default of issue upon her right heirs: the produce of the sale is to be considered as personal, and vests in the survivors at the death of the tenant for life without issue male. A settlement in trust for the husband for life, then for the wife for life, then for the children, as they

should appoint, in default of appointment, equally; if no children, according to their joint appointment; in default thereof, to the husband, his executors, &c. is a sufficient execution of the direction in the will. *Brograve v. Winder*, Vol. II. 634.

10. Devise in fee and bequest of personal estate to A. and in case of his death under twenty-one without leaving issue, to B.; codicil affirming the will in all respects, except by directing that A. shall not be entitled till twenty-five without issue, B. has no title. *Scott v. Chamberlaine*, Vol. III. 302. 491.

11. Testatrix by codicil gave to A. the legacy given by her will to the children of B. "as I know not whether any of them are alive, and if they are well provided for," though they are living, B. is entitled; the construction being, that if they are living they are well provided for. *Attorney-General v. Ward*, Vol. III. 327.

12. The legal estate in mortgaged premises did not pass by a general residuary devise by the mortgagee. *Duke of Leeds v. Munday*, Vol. III. 348.

13. Leasehold property bequeathed in remainder in trust for a child *in ventre*, if a son, for life; and after his decease, for such of his issue male as should be his heir at law at his death; if no such then living, for such persons as should then be the legal representatives of the testator: a son being born and dying without issue, the limitation over was established in favour of the next of kin according to the statute at the time of distribution. *Long v. Blackall*, Vol. III. 486.

14. Bequest by implication. *Wainwright v. Wainwright*, Vol. III. 558.

15. Money bequeathed to be laid

out in land to be settled upon the testator's nephew *A.* for life; remainder to the wife of *A.* for life; with remainders in tail to the sons and daughters of *A.* by such wife: *A.* was not married till after the death of the testator: held to extend to a second wife. *Peppin v. Bickford*, Vol. III. 570.

16. Money bequeathed to *A.* to remain at interest or to be by him laid out in real estates, to go with other estates devised. *A.* being tenant in tail of the real estate, and being entitled under an assignment of the money from the reversioner, subject to contingent limitations, disposed of the money by will: the Court inclined in favour of the disposition upon the ground, that *A.* might have called for the money as absolute owner: but it was established upon the option to continue it personal estate. *Amler v. Amler*, Vol. III. 583.

17. 10,000*l.* provided by settlement for one daughter or younger son; 15,000*l.* if more: there being but one daughter, the father by a will under a power reserved to him appoints the time of payment and the application of the interest of the 15,000*l.* provided for her by settlement, and gives her the farther sum of 5000*l.*: she was held entitled to 20,000*l.* *Phipps v. Lord Mulgrave*, Vol. III. 613.

18. Bequest of personal estate after a contingent limitation in tail, which did not take effect, established. *Ibid.*

19. The Chancellor and Master of the Rolls inclined to think, the legal estate in mortgaged premises passed by a general residuary devise by mortgagee to *A.* (also his executor) his heirs, executors, &c. for ever on the side of his mother. *A.* being nineteen, Chancellor would not order him to join in the convey-

ance under 7 Anne, c. 19. but ordered the money to be paid into the Bank *ex parte* the infant; and said, when he should come of age, it would be very reasonable, that he should join. *Ex parte Sergison*, Vol. IV. 147.

20. Testator gave to his wife the third part of all his property, that should become due to him after his decease: then after giving some legacies he gave all the residue of his estate in general words, subject to the payment of all his debts, funeral expenses, and legacies, upon trust to collect the same residuary estate and pay the same to certain persons. The wife is entitled to a third of the personal estate, subject to the debts, but not to the legacies. *Reed v. Addington*, Vol. IV. 575.

21. Testator by a will unattested, after giving, among others, charitable legacies, to be distributed by his executor or executors, gave "the remainder and residue of his estate, if any, and effects of what nature soever and wheresoever, which he should be seised on, possessed of, &c., next of kin or heir at law whom I appoint my executor" after debts, &c. paid. He left one brother, and by deceased brothers a niece and several nephews, one of whom was heir at law. Distribution decreed according to the statute. *Lowndes v. Stone*, Vol. IV. 649.

22. Lands originally held under old mortgages passed by a general devise: though no release of the equity of redemption appeared. *The Attorney-General v. Bowyer*, Vol. V. 300.

23. Where testator only proposed by his will an offer of certain estates to *A.* or whoever should after his (testator's) decease be entitled to certain other settled estates, and *A.* did no act in his life signifying he would do any thing, held that the

interest in such pre-emption did not descend to his real representative. *Earl of Radnor v. Shafto*, Vol. xi. 448.

24. Upon a devise of all waggon ways, implements, &c. used in his collieries in trust to be held and enjoyed with the collieries, held to pass, though of the nature of personal estate: affirming the decree of Lord Rosslyn, not as being satisfied with the principle, but from not being able to make one more satisfactory. *Stuart v. Marquis of Bute*, Vol. xi. 657.

25. Under a bequest of my house and all that is in it at my death, cash will pass, but not notes, which are only evidence of title to things out of it. *Quere*, As to Bank notes? *Ibid.*

26. A bequest of 200*l.* per annum, "part of the monies I now have in Bank security," entirely for her own disposal, held to give the wife an absolute interest in so much stock as would produce 200*l.* per annum. The word "effects," connected with furniture, &c. restrained to articles, *ejusdem generis*. *Rawlings v. Jennings*, Vol. xiii. 39.

27. A renewed lease does not pass by a previous will, bequeathing the lease, or the premises held on lease. *Gardom, ex parte*, Vol. xv. 288.

28. Testatrix reciting, that she was possessed of 12,700*l.* 3 per cent. consolidated Bank annuities standing in her name, gave and bequeathed the same, or so much of such Bank annuities as should be standing in her name at her death.

At the date of her will and at her death she had near 15,000*l.* in that fund, besides other stock. The excess beyond the sum mentioned did not pass. *Hotham v. Sutton*, Vol. xv. 319.

29. Legacy to a subscribing wit-

ness to a will, though of personal property only, void under the stat. 25 Geo. 2. c. 6. extending to all wills and codicils. *Lees v. Summersgill*, Vol. xvii. 508.

30. Testator gave legacies, with maintenance to his two illegitimate children, naming them, by C. B. and to all the other children he might have by her, 6000*l.* each, and after other bequests the residue among his said children. By codicil he directed maintenance of another child born since; also interlining his name with those of the other children in the first part of the will only. That child entitled only to maintenance and a share of the residue, not to the legacy of 6000*l.* *Arnold v. Preston*, Vol. xviii. 288.

31. Devise to devisor's wife of all his real and personal estates for her life, "and after her" to A. and his male issue: "for want of male issue after him" to B. and his male issue: "for his want of male issue" to two others and their male issue. An absolute interest in A. as to the personal estate. *Down v. Renny*, Vol. xix. 545.

32. Bequest of personal property to a man and his issue an absolute interest; but a limitation over for want of issue living at his death is good. *Ibid.* 547.

33. The sense of the words "die without issue," or "for want of issue," not to be departed from without satisfactory evidence, that they were not intended in that sense. *Ibid.*

[E.] EVIDENCE TO EXPLAIN.

1. Latent ambiguity arises *dehors* the will; and evidence is admissible to explain it; as in case of two manors of the same name, or an inadequate description of a child: not to explain a patent ambiguity upon

the face of the will. *Perry v. Phelps*, Vol. I. 259.

2. Will is ambulatory: but a specific bequest is fixed as much as a devise of land. *Ibid.* 260.

3. Testator devised to all the children of his two sisters *A.* and *B.*: *A.* long before the date of the will changed from the Jewish to the Roman Catholic religion, was baptized by a new name, and became a professed nun at Genoa: bill by the children of *C.* a third sister, living with *B.* at Leghorn, upon ground of mistake in testator, and evidence of intent to provide for his sisters at Leghorn, dismissed. *Delmare v. Robello*, Vol. I. 412.

4. Latent ambiguity produced and dissolved by parol, but parol never admitted on patent ambiguity. *Ibid.* 415.

5. Bequest to the son and daughter of one who has several sons, latent ambiguity. *Ibid.*

6. Parol evidence not admissible to show the intention of the testator against the construction upon the face of the will. *Cambridge v. Rous*, Vol. VIII. 22.

7. Court permitted parol evidence to show that the testator did not intend a legacy to a servant to be in satisfaction of a debt for wages, though the presumption from the whole will was that the legacy was not in addition, and such evidence prevailed. *Wallace v. Pomfret*, Vol. XI. 542.

8. Will never set aside without granting the issue *devisavit vel non*. *Pemberton v. Pemberton*, Vol. XI. 53.

9. Subsequent paper, though evidence of competence of a testator, regarded with considerable jealousy; as he is not permitted to prove his own sanity. Inference, that, if not then conscious of his competence at the previous time, he would have

re-executed the will. *Bootle v. Blundell*, Vol. XIX. 506.

10. Evidence of testator's declarations, previous and subsequent to his will, as to his intention admitted, but of little weight against what passed at the time of making it. *Langham v. Sanford*, Vol. XIX. 649.

And see DEVISE, 110. 113.—LEGACY, [O.]—MISTAKE.

WINDOWS, ANCIENT.

See INJUNCTION, 24.

WITNESS, EXAMINATION OF.

And see WILL, [D.] 27.—PRACTICE, [F.]

1. A father coming to bastardise his own issue is a legal, but very suspicious witness. *Standen v. Edwards*, Vol. I. 134.

2. Son employed under, paid by, and accounting to his father, may be a witness, but is not accountable to his father's principal. *Cartwright v. Hateley*, Vol. I. 292.

3. Witnesses ought not to disclose their evidence to parties. *Cooth v. Jackson*, Vol. VI. 32.

4. Bill for discovery, in aid of an action: demurrer by a mere witness allowed; though the discovery would be more effectual than the examination at law, and notwithstanding a charge of interest in the defendant; as to which he may be called by the plaintiff, waiving the objection, and if called against him may be examined upon *thee voire dire*. *Fenton v. Hughes*, Vol. VII. 287.

5. A party having called a witness cannot discredit him. *Ibid.* 290.

6. The mere interest of an auc-

tioneer from his commission will not defeat his evidence, as it is a known interest. *Buckmaster v. Harrop*, Vol. XIII. 474.

7. Witness who can recover nothing in the suit competent. *Crayen v. Tickell*, Vol. I. 61.

8. A witness attending under a *subpœna*, but refusing to be sworn on the ground of his religious principles, ordered to attend to be examined or stand committed. *Henegal v. Evance*, Vol. XII. 201.

9. Witness become insane, proof of his hand-writing allowed. *Bernett v. Taylor*, Vol. IX. 381.

10. Commission granted to examine witnesses in an enemy's country. *Cahill v. Shepherd*, Vol. XII. 335.

11. In equity objection to the

competence of a witness from interest not waived by cross-examination. *Moorhouse v. De Passou*, Vol. XIX. 433.

12. At law objection to the competence of a witness waived by pursuing his cross-examination, after his interest appears; which formerly could be inquired into only on the *voire dire*: now, if interest comes out at any period, the evidence is rejected. *Ibid.* 434.

13. The objection to a creditor, as a competent witness to sustain a commission of bankruptcy, cannot be taken by himself, to preclude his examination. *Ex parte Chamberlain*, Vol. XIX. 481.

14. Witness obliged to give testimony, though it affects his civil right. *Ibid.* 482.

ERRATA.

By error of the press title EVIDENCE is misplaced, and will be found in page 165.

Title PORTION in page 289. And titles SALES, SHORT BILLS, SIX CLERKS, and SEWERS are repeated at page 342.

Page 43, line 31, for "*St. Burke*," read "*St. Barbe*."

86, 11, insert "*Blagden, ex parte*."

100, 12, insert "*Eagleton v. Kingston*."

151, 21, insert "*Sterne, ex parte*."

159, 11, insert "*Trimmer v. Bayne*."

25, insert "*Roach v. Haynes*."

263, 10, insert "*Randall v. Willis*."

269, Title PEER, add "Irish peers entitled since the union to every privilege, and therefore, not being members of parliament, to the letter missive. *Robinson v. Lord Rokeby*, Vol. VIII. 601."

291, line 20, insert "Vol. xv."

336, 20, add "So depositions. *Eastham v. Liddell*, Vol. XII. 201."

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